Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1998

BEVERLY HORN,

Petitioner

v.

BASSETT FURNITURE INDUSTRIES, INC.,

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

1. Whether the Eighth Circuit Court of Appeals (hereinafter "Eighth Circuit" or "appellate court") reviewed the grant of summary judgment *de novo*, given that it stated that it affirmed the district court's ruling for the respondent for the reasons stated by the district court in its Memorandum Opinion and Order of June 19, 1997?

2. Whether the appellate court erred, in contravention of rule FED. R. CIV. P. 56(c) and established precedent, by affirming the district court's grant of the respondent's Motion for Summary Judgment and denial of the petitioner's Motion for Reconsideration on the issue of race discrimination?

3. Whether the appellate court erred in contravention of rule FED. R. CIV. P.56 (c) and established precedent, by affirming the district court's grant of the respondent's Motion for Summary Judgment and denial of the petitioner's Motion for Reconsideration on the issue of violation of the Americans with Disabilities Act ("ADA")?

4. Whether the appellate court erred, in contravention of rule FED. R. CIV. P. 56 (c) and established precedent, by affirming the district court's grant of the respondent's Motion for Summary Judgment and denial of the petitioner's Motion for Reconsideration on the issue of violation of the Family and Medical Act ("FMLA")?

List of Parties to the Proceedings in the Court Below

1. Beverly Horn, Petitioner (judgment is sought to be reviewed)

2. Bassett Furniture Industries, Inc., Respondent. The petitioner's research reveals that the respondent is the parent company and there are no non-wholly owned subsidiaries. Pursuant to SUP. CT. R. 29.6, please refer to Respondent's Corporate Disclosure Statement and Certificate of Interested Parties filed in the appellate court.

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Citations of Official and Unofficial Reports

This case is not reported.

Basis for United States Supreme Court Jurisdiction

(i) The petitioner requests that this Court review the denial of her appeal on June 26, 1998 by the Eighth Circuit from a ruling by the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, Honorable Susan Webber Wright presiding, District Court Case No. PB-C-96-413.

(ii) The petitioner requests that this Court review the denial of her Petition for Rehearing En Banc on July 28, 1998 by the Eighth Circuit. Denial of same is deemed to include denial for rehearing by the panel that decided the case pursuant to 8TH CIR. R. 35 (C) (4).

(iii) The statutory provision conferring jurisdiction on this Court is 28 U.S.C. § 1254(1).

Statutes Involved

(a) Employer practices

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to

discriminate against any individual with respect to his compensations, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000-e (a) (1) (2) (1994)

Equal Rights Under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (a) (b) (c) (1994)

Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employees compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

42 U.S.C. § 12112 (a) (b) (4) (1995)

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12

workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a) (1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e) (2) of this section, and section 2613 (b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of

this section beyond the amount of leave actually taken.

29 U.S.C. § 2612 (a) (1), (b)(1) (1998)

Prohibited acts
(a) Interference with rights
(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 U.S.C. § 2615 (a) (1)

Court Rules Involved

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

FED. R. CIV. P. 56(b)

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to

> any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56(c)

Statement of the Case

The Petitioner, Beverly Horn, ("Horn") was employed on two separate occasions by the respondent, Bassett Furniture Industries, ("Bassett") at Dumas, Arkansas. First, she was employed from August 5, 1993 to November 11, 1993 and second, from August 8, 1994 to October 25, 1995. On both occasions she was employed in the Cutting Department, and on both occasions she was supervised by first line supervisor, Katie Lemons ("Lemons") and second line supervisor, Jimmie Ross ("Ross"). Katherine Peacock ("Peacock") was Personnel Manager and Scottie Grimes ("Grimes") was Plant Manager on both occasions. At the time of the discrimination, the employees in this department were assigned to work in pairs or as partners in order to accomplish the job of spreading, positioning (fixing) and cutting, fabric into patterns used for furniture construction. While the day to day supervision was Lemons' responsibility, Horn daily came into contact and, indeed, took instructions from Ross on a regular basis. Occasionally, she received instructions

and work assignments from one JoAnn Henley ("Henley"), a long term employee.

At the time of the discrimination, Horn's work partner was Stacy Woods ("Woods") a white female. During both periods of Horn's employment, she and other employees had noticed that Lemons and Ross had made it a practice, for no good reason, to only acknowledge and only refer to the white partner by name whenever instructions were given to accomplish the work. As well, blacks was subjected to similar treatment by Henley whenever she assumed the responsibility of assigning the work. Aside from being subjected to the humiliation of not being called by name, this meant that the black employee had to rely upon the white partner, who was status equal and without supervisory authority, for instructions with regard to performing the work. This practice persisted over an extended period of time, for at least two and one-half years.

Furthermore, during the time of Horn's employment and at the time of her discharge, imposing unwarranted and unjustified disciplinary action upon the black employees had become a practice by Lemons and Ross. Indeed, it had been noticed that Ross was harsh and prejudice toward the blacks in the department. Also, in about August, 1995, invitations to a baby shower for Lemon's daughter were passed out at work. Only the white women in the department were invited.

Consequently, the hostile attitudes and actions of Bassett's supervisors toward the black employees resulted in racial tension in the department and hostility among the

employees. After having been subjected to the egregious treatment for many months, Horn approached Lemons and asked her if she would call her by name. Without apologizing, Lemons simply shook her head, walked away and continued to not call Horn by name. This awareness of the racial tension in the department among the black and white employees, caused Horn to next approach Ross and report to her that there were tension in the department which needed to be addressed. Indeed, Horn asked if the employees and supervisors could meet to try to resolve the problems. However, no action was taken by Ross.

On about October 19, 1995 friction between a white employee, Catherine Marshall ("Marshall"), and a black employee, Lynette Jones ("Jones"), resulted in a confrontation between the two in the department. Upon becoming aware of the confrontation, Lemons and Ross first called Marshall into the office. Next, they called in Jones. According to Jones, Lemons stated to her, "you're not acting like yourself and it's because of Beverly Horn." Finally, Lemons and Ross called Horn into the office. Ross inquired of Horn as to what had happened to cause the confrontation. Horn's reply was that race discrimination existed in the department and this had created tension among the employees. At this point, Ross stated, "well if you think it's race discrimination, then I'll just write you up."

Immediately, a disciplinary report was prepared by Lemons and Ross stating that Horn was excessively absent and tardy. It also included the statements that Horn had threatened

and intimidated other employees, and that she was stirring up trouble in the department instead of working. Upon being presented with the disciplinary form and after having read it, Horn requested that the statements alleging that she had threatened and intimidated other employees and that she was guilty of stirring up trouble instead of working; be removed before she signed the form, as the statements were untrue. Both Lemons and Ross refused to do so, and Horn refused to sign the form. She was then told by Lemons and Ross that her refusal would result in a three day suspension. Only at this time was she made aware that such a disciplinary policy existed, and on the day of the suspension, she was not told that she could not return to work unless and until she signed the form.

Therefore, she left the plant believing that once she served the suspension, she would be able to return to work without being required to sign the form. Subsequently, on October 25, 1995, Horn returned to work after serving the suspension. Immediately, she was called back into the office by Lemons and Ross who demanded that she sign the form as originally written. Even after her three day absence, the defendant still refused to rewrite the form. Again, Horn refused to sign it. At this point, Personnel Manager, Peacock, met with Horn and also insisted that she sign the form as originally written and without changes. Again, Horn requested of Peacock this time that the statements be removed and, again, agreed to sign the form if the changes were made. However, Peacock also refused, informing Horn that the decision to make

the changes rested with Ross. Peacock, however, testified on deposition that she had no information that Horn had threatened or intimidated any employees. Also, she stated on deposition that she did not create a modified version of the form to offer to Horn for signature. Upon Horn's refusal she was not allowed to continue to work and was, therefore, constructively and actually discharged.

Peacock has admitted and the district court has found that Bassett did, indeed, rewrite the disciplinary reports of a similarly situated white employee, Cindy Patton ("Patton"). Bassett prepared a disciplinary report concerning Patton's performance. Upon receiving the report, rather than signing it, Patton grabbed the report and left the plant. Without Patton's request and without knowledge that Patton would return to sign the form, Bassett voluntarily rewrote Patton's form in the event she returned to work. Patton did not return. Therefore, under similar circumstances Bassett provided an opportunity for a white employee to continue to work, had she desired to do so, but would not do the same for Horn.

Horn also alleges racially discriminatory discharge relevant to the FMLA and alleged excessive absences which were also a predicate for her termination. In 1994 and 1995, essentially, all of Horn's absences were used to attend to her chronically ill and disabled mother, Vera Robinson ("Robinson") or ill and disabled children, Thomse and Barbara. Two of the absences were pursuant to Horn being summonsed for jury duty. Horn usually presented a physician's statement or medical

certification when she returned from these absences. Furthermore, the defendant never questioned the adequacy of any of the statements As well, Bassett did not always require that Horn present a physician's excuse for each absence.

The defendant was apprised of the fact that Robinson suffered regularly with seizures, and on many occasions Horn was called away to assist with her care which sometimes did not require a doctor's visit, but simply care at home. Indeed, on August 17, 1995, Horn presented Bassett a letter from Delta Memorial Hospital stating that she had been there attending to her mother. Also, Horn had informed the defendant that she was sometimes called away to attend to Thomse, who was experiencing learning difficulty and was eventually diagnosed with Attention Deficit Disorder ("ADD") prior to her termination. On October 16, 1995, Horn presented a statement to Bassett indicating that she had been to Delta Counseling Associates ("DCA") with Thomse. The visit was in relation to his diagnosis of ADD. Furthermore, she had informed the defendant that Barbara, had a learning disability. On very rare occasions would Horn take off to attend to her own health needs. According to the Respondent's agent, Peacock, none of Horn's absences were recorded as FMLA qualifying leave entitlement.

As a matter of law, Horn qualified for FMLA qualifying leave on August 16, 1995. However, as a matter of fact and law, she also qualified for FMLA qualifying leave as of the date of the law's enactment, August 5, 1993. Pursuant to an affidavit

given by Peacock, since the enactment of the law, Bassett granted FMLA leave to all employees whether they qualified or not. Therefore, with respect to terms and conditions of employment relevant to the discharge and from which it emanated, Horn qualified for FMLA leave during her first and second periods of employment. Furthermore, she qualified for medical leave of absence pursuant to Bassett's own leave of absence policy pursuant to Peacock's testimony.

Between 1993 and 1995 Bassett granted FMLA qualifying leave to 29 employees. Only five were black individuals. The amount of time granted by Bassett ranged from 15-222 days In November, 1993, Horn suffered with high blood pressure. In an effort to control it, she decided to leave Bassett, unaware that she might be eligible for any kind of sick leave. At that time the FMLA was law, and as a matter of fact and law as well as Bassett's practice, she qualified for FMLA leave. She also qualified for a medical leave of absence pursuant to Bassett's internal policy. However, she was not offered FMLA qualifying leave nor was she offered a medical leave of absence, even though Bassett was aware of her medical condition. However, before and since Bassett has generously granted FMLA leave or a medical leave of absence to whites in highly disproportionate numbers in the interest of continuing their employment.

Peacock asserts that Horn's discipline for excessive absences goes to the issue of the alleged failure to work overtime. However, Bassett kept no overtime attendance

records concerning Horn and, indeed, none were produced with her Personnel File. Horn's time cards show that she did work in excess of eight hours on a regular and recurring basis. Moreover, Lemons would often allow Horn to miss overtime to make babysitting arrangements. Finally, Lemons, Horn's first line supervisor , stated on deposition that Horn's daily attendance during her regular tour of duty, 7:00 a.m. - 3:30 p.m., pursuant to the Daily Attendance Record, was the basis for Bassett's disciplinary action concerning excessive absences.

Horn's mother, son and daughter were disabled. Robinson suffered with epilepsy ands other chronic neurological and mental illnesses. Thomse suffered with ADD. Barbara had a learning disability. Bassett was apprised of this through medical certification and direct information from Horn. However, Bassett disciplined and ultimately discharged Horn for absences associated with caring for these family member. Yet, it granted inordinate amounts of leave and did not discipline white employees who took time off with their own disabilities and /or disabilities of family members. While Bassett violated Title VII and § 1981 relevant to equal treatment based upon race by discharging Horn because of her association with disabled family members, it also committed a per se violation of the ADA when it terminated Horn for the actual time off.

Horn's mother had a history of chronic and persistent neurological and emotional problems. She had been diagnosed with epilepsy and suffered with seizures. Many times Horn took off, on an intermittent basis, to care for her. Prior to the final

final diagnosis of ADD, Horn took her son, Thomse, to see his pediatrician and to be treated by an optometrist in the process of treating him for the disability and determining the final diagnosis. Horn apprised Bassett of her need to attend to her son, and, indeed, she took time off, intermittently, to do so. However, none of these absence were counted as FMLA qualifying leave, but were instead, counted against her as excessive absences for which she was ultimately discharged. Horn took only five and one-half days during a period when she qualified for twelve workweeks under the FMLA.

The petitioner's case involves federal questions. Therefore, jurisdiction in the court of first instance was based upon 42 U.S.C. § 2000-e, *et seq.*; 42 U.S.C. § 1981; 42 U.S.C. § 12101, *et. seq.*; 29 U.S.C. § 2601, *et. seq.* and 28 U.S.C. § 1331.

Argument for Allowance of the Writ

Title VII and it progenies have been litigated in this Court for more than 20 years. However, recently there has been a radical departure from precedent by the Eighth Circuit, the Civil Rights Act of 1991, notwithstanding. As well, the appellate court, in affirming the district court, departed from precedent concerning the law of summary judgment. This Court's supervisory power is, therefore, indicated.

Specifically, the petitioner argues for *certiorari* because the Eighth Circuit has decided all issues relevant to her claims in conflict with United States Supreme Court precedent as well as its own precedent and precedent of other circuit courts.

Those issues and citations to authority upon which the petitioner relies are not limited to but include to the following arguments.

First, the appellate court, based upon its statement that it affirmed the district court's judgment for the reasons stated in that court's opinion, indicates that it did not review the grant of summary judgment from the district court *de novo*. This is in contravention of *Shannon v. Ford Motor Co.*, 72 F.3d 678 (8th Cir. 1996) and *Crawford v. Runyon*, 37 F.3d 1338, 1340 (8th Cir. 1994). As well, in affirming the district court's decision, the appellate court also departed from the standard of review concerning the law of summary judgment in contravention of FED. R. CIV. P. 56 (c), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) and *Hillebrand v. M-Tron Indus.*, 827 F. 2d 363, 365 (8th Cir. 1987). Specifically, many facts were not decided in the light most favorable to the non-movant, Horn. Also, conflicting evidence was not decided in the light most favorable to Horn. Furthermore, all reasonable inferences which could be drawn from the evidence were not decided in the light most favorable to Horn.

Second, Congress and this Court visualizes Title VII cases in a special category given the framework for analysis, the humanitarian underpinnings for the law and the difficulty in proving discrimination. Disposal of the petitioner's claims on a grant of summary judgment where the respondent's intent is at issue, due to the intense fact pattern, is in contravention of Congressional intent in addition to precedent including *Hillebrand* at 365 (quoting *McDonnell Douglas Corp. v. Green*,

411 U.S. 792, 802 (1973)); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1053 (7th Cir. 1993) and *Robinson v. PPG Indust., Inc.* 23 F.3d. 1159,1162 (7th Cir. 1994). *Sarsha* held:

> Summary judgment is appropriate only when the material before the court demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. This standard is applied with "added rigor" (*emphasis mine*) in employment discrimination cases, where intent and credibility are crucial issues. Accordingly, we will affirm the decision of the district court only if, had the record before the court been a complete trial, the defendant would have been entitled to a directed verdict.

Id. at 1058. The petitioner's case is not susceptible to disposal on summary judgment. The intense fact pattern require that the trial of fact have an opportunity to examine the credibility of the witnesses and other evidence. The respondent's witnesses, for example, state that Horn was disciplined for failure to work overtime, yet her time cards show that she did work overtime and the respondent could produce no overtime attendance records. As well, the respondent's agent testified that Horn was disciplined for her attendance during here tour of duty, which would have been in violation of Title VII, the ADA, and regular FMLA. See *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d. 1473 (6th Cir. 1990). The pivotal point in Horn keeping her job was the changing of the contents of the disciplinary

document. The respondent refused to change it. Yet it admitted that it rewrote the disciplinary document of a white employee, Patton, in the interest of continuing her employment. This is in disparate treatment and in contravention of *Kientzy v. McDonnell Douglas Corp.*, 990 F. 2d. 1051, 1058-1059 (8th Cir. 1993).

Third, the appellate court affirmed the district court's narrow ruling holding that the petitioner could not bring a claim for a hostile work *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455,466 (5th Cir. 1970) environment because it was not within the scope of her EEOC charge. This ruling was in in contravention of *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664 (8th. Cir. 1992), and *Harris v. Forklift Sys., Inc.*, 510, U.S. 17 (1993). The court essentially ruling that Horn could not bring this claim because she did not mention it in her EEOC charge. As well, the appellate court affirmed the district court's arbitrary holding that a hostile environment did not exist due to the degree of racial hostility experienced by the petitioner. *Harris* does not require hostility to any particular degree for a claim to be actionable. As well, *Harris* at 21 holds that a claim of discrimination based upon race is inclusive of the entire spectrum of disparate treatment based upon race which is allowed by prevailing law, including requiring people to work in a racially hostile or abusive work environment (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)). Therefore, it was not necessary for Horn to specifically mention the existence of a hostile environment in her EEOC charge. As well the

appellate court disregarded its own ruling in *Kopp v. Samaritan Health Sys., Inc*, 13 F.3d 264 (8th Cir. 1993) and *Hall v. Gus Constr., Co., Inc.* 842 F. 2d 1010, 1014 (8th Cir. 1988) in which the facts were analogous to the petitioner's case. In those cases, the appellate court found the existence of a hostile work environment sufficient to deny the defendant's motion for summary judgment. *Kopp* at 269.

Fourth, in reference to the FMLA, the respondent admitted that the petitioner was never granted any family and medical leave during a time at which she was entitled to it. Furthermore, the disciplinary action taken against Horn in which the respondent prepared a document stating that she was excessively absent, interfered with her rights under the FMLA. The district and appellate courts both overlooked these facts concerning this violation. See *Manuel v. Westlake Polymers, Corp.*, 66 F3d 758 (5th Cir. 1995). Given that the FMLA is a fairly recently enacted law, this Court should grant *certiorari* concerning this important federal question. As well the evidence showed and the respondent admitted that it granted FMLA leave to its employees whether they qualified for it or not. However, they did not do so for the petitioner, an African American, during neither periods of her employment. Yet, the respondent's own evidence showed that it granted the leave to white employees in highly disproportionate numbers. The petitioner argues that this Court should review the appellate court's decision because in addition to the *per se* FMLA violation, the respondent also violated Title VII and § 1981in its

manner of granting FMLA as well as company leave of absence. This was overlooked by the Eighth Circuit.

Fifth, apparently the appellate court utilized the EEOC Interpretative Guidelines for the ADA as final authority concerning Congressional intent regarding discrimination under the ADA. The district court held and the appellate court affirmed essentially, that there was no violation of the ADA because if the respondent disciplined Horn, it was for actually taking off to care for disabled family members as opposed to disciplining her based upon a belief that she would take time off to care for disabled family members. Both courts supported this ruling based upon *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 214 (4th Cir. 1994) (citing 29 C.F.R. § 1630.8) and ruled, succinctly, that there is no violation if an employee is disciplined for past absences to take time off to care for a disabled family member. It is the petitioner's position that this interpretation is error and not Congress's intent within the meaning of the act. If this interpretation were correct, it would fly in the face of the FMLA when applied to the same set of facts. A litigant could conceivable prevail under the FMLA for taking care of a family member with a disability found to also be a serious health condition, but lose an ADA claim for actually taking time off to care for that individual. *Certiorari* should be granted to reconcile these laws.

Finally, the appellate court has accepted that the defendant had a legitimate nondiscriminatory reason for discharging Horn, her refusal to sign the disciplinary document.

However, it has erred because the respondent disciplined Horn for illegal reasons. Disciplinary action initiated on an illegitimate basis, cannot result in a legitimate discharge. The appellant court's ruling has resulted in the respondent be allowed to violate the law indirectly, something which it cannot do directly.

The Eighth Circuit has narrowly construed the laws which Congress and this Court has mandated should be broadly construed. This has resulted in the affirmance of the district court's ruling which is error. There do remain genuine issues of material fact and the respondent was not entitled to judgment as a matter of law. Therefore, in addition to all of the foregoing arguments, along with the fact that the petitioner suffered tangible job detriment, the loss of her job; summary judgment was not properly granted and *certiorari* should be granted by the United States Supreme Court.

Respectfully submitted,
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APPENDIX

IN THE UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Date of Entry: 06/19/97

BEVERLY HORN,	*	
Plaintiff	*	
	*	
vs.	*	**No. PB-C-96413**
	*	
BASSETT FURNITURE	*	
INDUSTRIES, INC	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

The plaintiff Beverly Horn ("Horn") alleges that her discharge from employment with defendant Bassett Furniture Industries, Inc. ("Bassett") was because of her race and because she took leave to care for her allegedly disabled and/or ill family members, in violation of 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2601 et seq, ("FMLA"). In her complaint, Horn also claims that unspecified terms and conditions of her employment with Bassett were racially discriminatory and created a racially discriminatory hostile environment. Before the Court is defendant's motion for

summary judgment.[1] Having carefully considered defendant's motion, plaintiff's response,[2] defendant's reply,[3] and plaintiff's rejoinder or response to defendant's reply,[4] this Court hereby grants defendant's motion for summary judgment.

I.

Horn has been employed by Bassett on two separate occasions. The first time, Horn worked for Bassett from approximately August of 1993 until November of 1993 when she resigned from her position. Then in August of 1994, Horn visited Bassett's Dumas plant and discussed with Bassett management the possibility of resuming her employment. In August of 1994, Bassett rehired Horn to work in the cutting room of its Dumas plant.

Horn's immediate supervisor at Bassett was Katie Lemons ("Lemons"). Lemons' immediate supervisor was Jimmie Ross ("Ross"). Kathryn Peacock ("Peacock") was the personnel manager, and Scottie Grimes ("Grimes") was the plant manager. Horn's stated working hours were Monday through Friday from 7:00 a.m. until 3:30 p.m. However,

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[1] Docket No. 20.

[2] Docket No. 24.

[3] Docket No. 29.

[4] Docket No. 32.

sometimes Bassetts employees were required to work overtime. Peacock claims that she told applicants during the interview process that as a requirement of the job in the cutting room, the applicants had to be available to work as many as ten hours per day, six days per week.

The parties do not dispute that while working in Bassett's cutting room, Horn received a disciplinary report from Lemons and Ross, her supervisors. Although the events giving rise to the report are in dispute, the report cited Horn for being excessively absent and tardy. The report also alleged that Horn had "threated and intimidated" other employees and had "stirred up trouble." (Br. in Supp. of Def.'s Mot. for Summ. J. [hereinafter "Def.'s Mot."] Ex. 3A.)

Horn's supervisors asked her to sign the report, maintaining that a company policy required employees to acknowledge receipt of disciplinary reports by signing them. Horn stated that because the allegations that she had threatened and intimidated other employees and had stirred up trouble were untrue, she refused to sign the report.

Lemons and Ross State that they explained to Horn that by signing the report, she would not be agreeing with the content of the report but would merely be acknowledging that she had been presented with the report. Horn's supervisors also allege that they explained to Horn that she could write her own version of events and state on the report form specifically provided for doing so.

Horn still refused to sign the report. On October 19,

1995, Horn was suspended for three days for refusing to sign the report. Horn maintains that only at the time of her suspension was she told that it was Bassett's policy to take such action against employees who refused to sign disciplinary reports. Horn claims that there was no written notice of this disciplinary policy in Bassett's Employee Handbook, that the policy was not posted anywhere at the plant, and that the policy had never been discussed with her prior to this incident.

After her three-day suspension, Horn returned to work and again met with her supervisors. The parties dispute what happened next. Horn claims that she offered to sign the report if notations about her attitude and her stirring up trouble were removed. (Def.'s Mot. Ex. 1 at 93.) According to Peacock and Ross, after discussing the matter with Ross, Peacock offered to remove the "threats' and "stirring up trouble' notations from the report. Horn maintains that no revised report was ever prepared for her signature. However, Horn admits that she was informed that she would have to sign the report to return to work at Bassett. (Def.'s Mot. Ex. 1 at 146.) Horn again refused to sign the report. Both parties agree that after this final meeting, Horn was no longer considered as or considered herself to be an employee of Bassett.

Horn filed a charge of discrimination against Bassett with the Equal Employment Opportunity Commission ("EEOC") on March 7, 1996. At that time, Horn was represented by the attorneys who are currently representing her in this action. Horn's attorneys notified the EEOC of the

attorney-client relationship. Horn stated the following in her EEOC charge:

> I am a black female American citizen; and I am the mother of children who are disabled. On or about October 28, 1995, my employer fired me when a disturbance, in which I was not involved, arose in my work area between white and black employees. I was accused by my supervisors, Katie Lemons and Jimmie Ross, of stirring up trouble and was fired. I believe that I was fired because of my race. Also, I had been allowed excused absences to take care of my children. However, I was also told that I was being fired because I had missed too much time off caring for my children. I believe that I was fired due to disability and due to race. It is also my belief that my employer violated the Family and Medical Leave Act when I was terminated.

(Def.'s Mot. Ex. 1A.)

On May 22, 1996, the EEOC issued a pre-determination letter on Horn's charge. Horn's attorneys claim that they were not privy to the document and did not become aware of the document until Horn's deposition on March 12,1997. In the pre-determination letter sent to Horn, the EEOC stated *inter alia:*

> The evidence indicates that you were fired from your position for insubordination for refusing to acknowledge through signature a Disciplinary Report even though it was explained to you that your signature did not constitute a confession or

> admission to the allegations in the report. Further, you were told that the disciplinary report provided you protection as well since you had the opportunity to state your position and/or account of events on the disciplinary report.
>
> Also, there is no evidence of record to show that your Employer was aware that your children were disabled.

(Def.'s Mot. Ex. lB.) Then, on June 27, 1996, Horn filed the current action.

II

In support of defendant Bassett's motion for summary judgment, Bassett asserts that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on Horn's claims regarding her employment with Bassett from 1994 to *1995*, specifically Horn's claim alleging a racially discriminatory hostile environment; Horn's claim alleging constructive discharge; Horn's claim alleging discriminatory discharge; Horn's ADA claims; and Horn's FMLA claims. The Court will examine each of these arguments in turn. In addition, the Court also will examine Horn's claims regarding her employment with Bassett during 1993.

A. The Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. *P.56(c).* As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp. V. Catrett,* 477 U.S. 317, *325* (1986). Once the moving party has properly supported its motion for summary judgment, the non moving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, *586* (1986). The nonmoving party may not rest on mere allegations or denials of her pleading but must "come forward with 'specific facts showing that there is a *genuine issue for trial.'" Id.* at 587 (quoting Fed. R. Civ. P.56(e) and adding emphasis). *See also Anderson V. Liberty Lobby, Inc., 477* U.S. 242, *256* (1986). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita, 475* U.S. at 587. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (citation omitted). The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law. *Holloway V. Pigman,* 884 F.2d 365, 366 (8th Cir. 1989).

B. Horn's Employment with Bassett from 1994 to 1995

1. Racially Discriminatory Hostile Environment

Bassett claims that Horn's allegations regarding a racially

discriminatory hostile environment were not raised before the EEOC, were not a subject of the EEOC's investigation into Horn's charge of discrimination, and are not like or related to Horn's EEOC charge of discrimination. Therefore, Bassett requests that this Court grant summary judgment and dismiss Horn's racially discriminatory hostile environment claim. This Court concludes that Horn cannot proceed with her claim alleging a racially discriminatory hostile environment under Title VII. Even though a hostile environment claim would be preserved under 42 U.S.C. § 1981, the Court has carefully reviewed the record before it and grants Bassett's motion for summary judgment on the § 1981 claim, as well.

The plaintiff in a Title VII action may raise only claims "like or related to" the plaintiff's charge before the EEOC. *Satz V. ITT Fin. Corp.*, 619 F.2d 738, 741(8th Cir. 1980). As the Eighth Circuit Court of Appeals has explained:

> Title VII establishes an administrative procedure which a complaining employee must follow before filing a lawsuit in federal court. *Alexander V. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Exhaustion of administrative remedies is central to Title Vii's statutory scheme because it provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts. *Patterson V. McLean Credit Union*, 491 U.S. 164,180-81(1989).

Williams V. Little Rock Mun. Water Works, 21 F.3d 218, 222 (8th Cir. 1994).

Because the goal of Title VII is voluntary compliance through conciliation, courts have held that the scope of a Title VII complaint may go as far as but no farther than the scope of the EEOC investigation reasonably stemming from the EEOC charge. "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notico of the charge, as surely as would an initial failure to file a timely EEOC charge." *Id.* at 223 (quoting *Babrocky v. Jewell Food Co. & Retail Meat Cutters,* 773 F.2d 857, 863 (7th Cir. *1985)). See also Smith V. Foote's Dixie Dandy, Inc.*, 941 F.Supp. 807, 811 (E.D. Ark. 1995); *Paulino v. Miller,* 32 F.E.P. Cases 1230, 1232 (E.D. Ark. 1983). Furthermore, it is clearly established in this district that:

> it cannot fairly be said that plaintiff's complaints of discrimination in promotion, wages, placement and "other policies and practices" are like or related to the charge of discrimination in firing.

Combs V. C.A.R.E., Inc., 617 F.Supp. 1011, 1012 (E.D. Ark. 1985). *See also Paulino,* 32 F.E.P. Cases at 1232 (same); *Pickney v. American Dist. Tel. Co. of Ark.*, 568 F.Supp. 687, 691-92 (E.D. Ark. 1983)(same). Furthermore, this rule has been uniformly applied, without regard to whether the individual

filing the initial EEOC charge of discrimination did so with the assistance of counsel. *See, e.g., Paulino,* 32 F.E.P. Cases at 1230 (involving a *pro se* plaintiff).

In the case at bar, Horn's attorneys claim that because they were unaware until Horn's deposition that Horn received a pre-determination letter from the EEOC, this Court should treat Horn as if she filed her initial EEOC charge of discrimination *pro se.* Horn's attorneys maintain that a more lenient rule should be applied to Horn's case. This Court disagrees. Even if this Court were to treat Horn as if she filed her initial EEOC charge pro *Se,* this Court would still require that Horn's racially discriminatory hostile environment claim be "like or related to" her charge before the EEOC in order to be properly raised in her Title VII civil complaint.

After reviewing the record before it, this Court concludes that Horn's claim alleging a racially discriminatory hostile environment is not like or related to her EEOC claim of discriminatory discharge. In her EEOC charge, Horn stated that her discharge was based on her race, her association with her disabled children, and in violation of the FMLA. Her EEOC charge was quite specific and mentioned nothing about a racially discriminatory hostile environment or discriminatory terms of employment in promotion, pay, training, work conditions, or work requirements. (Def.'s Mot. Ex. 1A.) Horn also admitted in her deposition that she complained only of being fired for discriminatory reasons when she filed her EEOC charge. (Def.'s Mot. Ex. 1 at 94.)

In addition, based upon the EEOC pre-determination letter, the EEOC investigated only Horn's termination. In the letter, the EEOC concluded that Horn was fired for refusing to acknowledge through signature the disciplinary report and that there was no evidence in the record that Bassett was aware prior to Horn's termination that Horn's children were disabled. The EEOC pre-determination letter does not indicate that its investigation included allegations of a racially discriminatory hostile environment or discriminatory terms and conditions of employment at Bassett.

Based upon the foregoing analysis, this Court concludes that Horn's claim of a racially discriminatory hostile environment was not raised before the EEOC, was not a subject of the EEOC's investigation into Horn's charge of discrimination, and is not like or related to Horn's charge of discrimination before the EEOC. Therefore, Horn cannot proceed under Title VIJ with her claim alleging a racially discriminatory hostile environment.

The hostile environment claim under 42 U.S.C. § 1981 requires a different analysis. Prior to the 1991 Civil Rights Act, racial discrimination with respect to general conditions of employment was not actionable under § 1981. *See Patterson*, 491 U.S. at 175-82. However, the 1991 Civil Rights Act amended § 1981 and expanded its coverage to include "all benefits, privileges, terms, and conditions" of contractual employment relationships. 42 U.S.C. §1981(b). Thus, the scope of § 1981 now extends beyond its traditional causes of action

for hiring, firing, and promotions, to include general conditions of employment and incidents of alleged racial harassment in the workplace. *See Jeffries V. Metro-Mark, Inc.*, 45 F.3d 258, 261(8th Cir. 1995); *Fray V. Omaha World Herald Co.*, 960 F.2d 1370,1373 (8th Cir. 1992). *Accord Dennis V. County of Fairfax, 55* F 3d 151,155 (4th Cir. 1995).

Because this Court concludes that Horn has stated a claim alleging a racially discriminatory hostile environment under § 1981, the Court will now determine what Horn must establish to state a *prima facie* case of hostile environment racial harassment. There is very little case law from the Eighth Circuit Court of Appeals analyzing hostile environment racial harassment claims brought pursuant to ~ 1981. However, the Eighth Circuit Court of Appeals has analyzed a hostile environment racial harassment claim brought pursuant to Title VII. *Jeffries, 45* F.3d at 258.

In *Jeffries v. Metro-Mark, Inc., the* Eighth Circuit applied the notice liability scheme used to hold employers liable in hostile environment sexual harassment cases to a racial harassment case. The court determined that when confronted with allegations of racial harassment, an employer is liable only for events of which it knows or should have known... and with respect to which it fails to take corrective action." Id. at 259. *See also Meritor Savings Bank, FSB V. Vinson,* 477 U.S. 57, *65-67* (1986)(treating cases of sexual harassment in the workplace the same as cases involving racial harassment). *Accord White V. Federal Express Corp.*, 939 F.2d 157, 160 (4th

Cir. 1991); *Shell V. Suffolk County,* 782 F.2d 1094, 1103-04 (2d Cir. 1986); *DeGrace v. Rumsfeld,* 614 F.2d 796, 804-05 (1st Cir. 1980).

Furthermore, many courts have applied the standard for hostile environment sexual harassment claims to hostile environment claims brought pursuant to the ADA and based upon harassment directed toward individuals with disabilities. *See, e.g., E.E. 0. C. v. MTS Corp.,* 937 F.Supp. 1503, 1510 (D. N.M. 1996); *Gray v. Ameritech Corp.,* 937 F.Supp. 762, 771 (N.D. 111.1996); *McClain v. Southwest Steel Co.,* 940 F.Supp. 295, 301 (ND. Okia. 1996); *Haysman v. Food Lion, Inc.,* 893 F.Supp. 1092,1106 (S.D. Ga. 1995); *Mannell V. American Tobacco Co.,* 871 F.Supp. 854, 860-61 (E.D. Va. 1994).

Based upon the Eighth Circuit Court of Appeal's decision in *Jeffries* and the approach taken by other courts when analyzing hostile environment claims, this Court concludes that the standard used to analyze hostile environment sexual harassment claims will be applied to analyze Horn's hostile environment racial harassment claim brought pursuant to § 1981. Therefore, to state a *prima facie* case of hostile environment racial harassment, Horn must establish by a preponderance of the evidence that:

> (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment; and (5) her employer

knew or should have known of the harassment and failed to take proper remedial action.

See Callanan V. Runyun, 75 F.3d 1293,1296 (8th Cir. 1996).

Horn meets the first requirement. Because she is black, Horn belongs to a protected group. To meet the second requirement, Horn must establish that by her conduct, she indicated that the alleged harassment was unwelcome. *See Quick V. Donaldson Co.,* 90 F.3d 1372,1377 (8th Cir. 1996). Harassing conduct is considered unwelcome if it was "uninvited and offensive." *See Burns V. McGregor Elec. Indus., Inc.,* 989 F.2d 959, 962 (8th Cir. 1993).

To meet the third requirement and establish that the harassment she complains of was based on race, Horn must establish that members of one race were exposed to disadvantageous terms or conditions of employment to which members of another race were not exposed. *See Quick,* 90 F.3d at 1378 (quoting *Harris V. Forklift Sys., Inc.,* 510 U.S. 17, 25 (1993)(Ginsburg, J., concurring)).

To meet the fourth requirement and establish that the harassment affected a term, condition, or privilege of employment, Horn must demonstrate that her workplace was permeated with "discriminatory intimidation, ridicule, and insult" that was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive work environment." *Meritor, 477* U.S. at 67. *See also Harris,* 510 U.S. at 21. To determine whether Horn's work environment was hostile or

abusive, this Court must consider all of the circumstances including the frequency of the alleged discriminatory conduct; its severity; whether it was physically threatening or humiliating or instead involved merely offensive utterances; and whether it unreasonably interefered with Horn's work performance. *Id* at 22. If Horn is unable to demonstrate that the alleged harassment was so severe or pervasive that it created an abusive working environment, Horn cannot withstand Bassett's motion for summary judgment. *Callanan*, 75 F.3d at 1296. The final element requires that Horn establish that Bassett knew or should have known of the alleged harassment and failed to take immediate and appropriate action. *Id.*

When ruling on Bassett's motion for summary judgment, this Court is obligated to view all inferences to be drawn from the underlying facts in the light most favorable to Horn, the party opposing the motion. Essentially, Horn bases her hostile environment racial harassment claim on the following three allegations: (1) black employees were subjected to unjustified disciplinary action, (2) Lemons failed to address black employees by name, and (3) no black employees received an invitation to a baby shower for Lemons' daughter.

After carefully reviewing the record in this case, this Court concludes that although Horn has submitted several general statements from other Bassett employees and excerpts from her own deposition to support her hostile environment claim, these general statements do not contain specific facts regarding particular incidents which if true would be sufficient

to establish Horn's hostile environment claim.[5] *See Johnson V. City of Fort Wayne, Ind.*, 91 F.3d 922, 938 (7th Cir. 1996) (concluding that general allegations do not suffice to establish an actionable claim of harassment); *Carter v. Ball, 33 F.3d 450,* 461-62 (4th Cir. 1994) (same); *Nazaire v. Trans World Airlines,*

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[5] According to Black's Law Dictionary, an affidavit is:

> [a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Black's Law Dictionary 54 (5th ed. 1979).

Horn repeatedly refers to "affidavits" attached to her responses to Bassett's motion for summary judgment. However, none of the statements attached to Horn's responses have been notarized or indicate that such statements were made before a person having authority to administer an oath or affirmation. Therefore, this Court will refer to the statements attached to Horn's responses as statements, not affidavits. Furthermore, because Bassett has not moved to strike for improper form the statements submitted by Horn, this Court will consider such statements when evaluating Bassett's motion for summary judgment and will weigh the credibility of such statements accordingly.

Horn also requests that this Court disregard the affidavits submitted by Bassett in support of Bassett's reply to Horn's response to Bassett's motion for summary judgment. Horn makes this request claiming that the affidavits submitted by Bassett were dated after and allegedly inconsistent with the statements submitted by Horn. *(See* Pl.'s Rejoinder to Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. [hereinafter "Pl,'s Rejoinder"] at 5.) The Court denies Horn's request.

Inc., 807 F.2d 1372, 1380 (7th Cir. 1986) (same); *McCray v. PPC Indus., Inc.*, 942 F.Supp. 288, 293 (ED. Tex. 1996) (same).

Horn has not alleged that the incidents of harassment at Bassett included intimidation, ridicule, or insult that was overtly racial, consisted of racial epithets, or perpetuated racial stereotypes. *Cf West Philadelphia Elec. Co.*, 45 F.3d 744, 748 n.2 (3rd Cir. 1995) (alleged abuse included conducting racially harassing conversations, posting racially derogatory Ku Klux Klan pictures on bulletin boards around the work place, using racial slurs, making racial threats, hanging a large noose in the entranceway, and painting a confederate flag on the side of a co-worker's helmet); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1272 (7th Cir. 1991) (alleged abuse included hanging a black dummy over the door of the plaintiff's workstation, painting graffiti in the restroom which read "KKK" and "All niggers must die," and calling the plaintiff "Buckwheat"). Horn has not alleged that her Bassett supervisors physically touched or harmed her. *Cf Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993) (allegations of alleged abuse included actual physical contact and harm). Furthermore, Horn has not provided specific facts to indicate how long the alleged hostile environment existed at Bassett. *Cf Smith v. St. Louis Univ.*, 109 F.3d 1261, 1262-63 (8th Cir. 1997) (alleged abuse occurred for over three years); *West*, 45 F.3d at 755 (alleged abuse occurred consistently for three years); *Kopp*, 13 F.3d at 269 (alleged abuse occurred for more than a decade). Horn also has not

provided specific facts to indicate how frequently the alleged abuse occurred. *Cf Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082-83 (3rd Cir. 1996) (6lack employees were harassed on a daily basis from 1986 through 1992); *West*, 45 F.3d at 755 (noose and Ku Klux Klan photos remained in the workplace for a period of months). In addition. Horn has not presented evidence to indicate how the alleged hostile environment affected her. *Cf Smith*, 109 F.3d at 1263 (evidence indicated that the plaintiff was hospitalized twice as a result of stress and emotional trauma); *Kopp*, 13 F.3d at 267 (evidence indicated that the plaintiff developed specific emotional and physical problems such as insomnia, headaches, loss of appetite, aggravation of a back problem, hypervigilance, exaggerated startle response, and post traumatic stress disorder).

Therefore, this Court concludes that Horn's allegations of harassment fail far short of the level of harassment required to state a Title VII violation, even assuming that all of the conclusory allegations Horn offers are true. Horn bases her hostile environment claim on three general allegations. Horn's first general allegation is that black employees were subjected to unjustified disciplinary action. Specifically, Horn alleges that she received an unjustified disciplinary report and that Lemons and Ross spoke in harsh tones to black employees. This Court rejects Horn's assertion that the fact that only she received a disciplinary report, even though two other employees were involved in and questioned about the incident which lead to her receiving a disciplinary report, is evidence that a racially

discriminatory hostile environment existed at Bassett. The incident which lead to Horn's receiving a disciplinary report allegedly involved Catherine Marshall ("Marshall"), a white employee, and Lynette Jones ("Jones"), a black employee. (Br. in Supp. of Pl's Resp. to Def.'s Mot. for Summ. J. [hereinafter "Pl.'s Resp."] Ex. 2 at 24-25.) Horn alleges that she, Marshall, and Jones were called in to talk to their supervisors but that only she was disciplined. Marshall did not recall what her dispute with Jones was about nor did she recall implicating Horn in the matter. (Pl.'s Resp. Ex. 2 at 24-25.) Furthermore, Jones stated that she and Marshall were called in to talk to their supervisors but that they were called in several weeks before Horn was suspended. (Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. [hereinafter "Def.'s Reply"] Ex. 3.)

Even if this Court assumes that the incident between Jones and Marshall occurred; that the incident did not involve Horn; that Horn, along with Jones and Marshall, was called in to talk to her supervisors; and that only Horn was disciplined, these allegations fail to support Horn's claim of racial discrimination. Although it is true that Marshall, a white employee, was not disciplined for her involvement in the incident, Jones, a black employee, was also not disciplined for her involvement in the incident. Because Jones was not disciplined, Horn cannot rely on this incident to illustrate disparate treatment based upon race. Instead, this incident illustrates that Horn was treated differently than Marshall, a white employee, and Jones, a black employee.

Horn also alleges that black employees were subjected to unjustified disciplinary action because Lemons and Ross spoke in harsh tones to black employees. To support this allegation, Horn offers statements and deposition excerpts from several other Bassett employees. However, based upon the Court's review of the record, much of the evidence Horn offers actually discounts her claim that black employees were subjected to unjustified disciplinary action at Bassett. For example, Patricia Plunkett ("Plunkett"), a white Bassett employee, stated that she thought Ross, a supervisor at Bassett, was prejudiced against black employees. (Pl.'s Resp. Ex. M. at 13.) Plunkett stated that Ross "stayed on" and "fussed at" black employees a lot. (Pl.'s Resp. Ex. M at 14.) However, Plunkett also stated that Ross fussed at everyone, that she never heard any derogatory comments directed at black employees, and that she could recall no particular incidents involving conduct which she felt was offensive to black employees. (Pl.'s Resp. Ex. M at *15,17.)*

Jones, a black Bassett employee, stated that Ross treated all employees unfairly and that black employees, including Horn, were treated no differently than white employees. Jones did not think that Lemons treated any employees unfairly. (Def.'s Reply Ex. 3.) Jones also admitted that although she believed that white employees in the cutting department got better raises than black employees, she had no proof of this. (Def.'s Reply Ex. 3.) Bobbie Gibson ("Gibson"), another black Bassett employee, stated that Ross was unfair but that she was unfair to and yelled

at black and white employees alike. *(Def.'s* Reply Ex. 4.) Similarly, Linda Reeves ("Reeves"), a white employee who worked with Horn at Bassett, stated that she had never seen Ross or Lemons treat black employees differently than white employees. (Def.'s Reply Ex. 7.)

Horn's second general allegation in support of her hostile environment claim is that black employees were not called by name by Lemons, a supervisor in Bassett's cutting department. Horn claims that this happened to her. (Pl.'s Resp. Ex. B at 57.) Horn also claims that she complained to Lemons about this practice and asked Lemons to call her by name. (P1. '5 Resp. Ex. B at 57.) Horn alleges that Lemons merely shook her head, walked away, and continued not to call Horn by name. Horn also alleges that she talked to Lemons about this practice again when Horn was suspended. Horn claims that she never received an apology from Lemons.

To support this allegation, Horn again offers statements and deposition excerpts from several other Bassett employees. However, much of this evidence indicates that even if the practice occurred as Horn alleges, when the practice was called to Lemons' attention, Lemons started calling all employees by name. For example, in the statement Jones gave to Horn, Jones, a black Bassett employee, claimed that Lemons did not call her by name but called white employees by name. (P1's Resp. Ex. D.) However, in the affidavit Jones gave to Bassett, Jones stated that when she called this practice to Lemons' attention, Lemons started calling Jones by name. (Def.'s Reply Ex. 3.)

Horn also offers the statements of Gibson and Donna Steverson ("Steverson"), two black Bassett employees. In the statement Gibson gave to Horn, Gibson stated that Lemons did not acknowledge her by name but that Lemons did call white employees by name. (Pl.'s Resp. Ex. E.) However, in the affidavit Gibson gave to Bassett, Gibson stated that although Lemons did not call her by name, after Jones spoke to Lemons and told Lemons that employees were offended by this practice, Lemons tried to call all employees by name. (Def.'s Reply Ex. 4.)

In the statement Steverson gave to Horn, Steverson stated that she "regularly witnessed harsh and disrespectful treatment of blacks in the department by [the] supervisor, in particular regarding the manner in which blacks were addressed. Blacks were not acknowledged by name and whites were." (Pl.'s Resp. Ex. F.) However, in Steverson's deposition, she admits that although she was a black employee at Bassett, her supervisors did call her by name on occasion. She stated that not being called by name was not a problem she had but one that she witnessed other employees having. Moreover, Steverson did not describe any specific incidents to corroborate her allegations. (Pl.'s Rejoinder to Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. [hereinafter "Pl.'s Rejoinder"] Ex. B at 16.)

Horn also offers excerpts of the deposition testimony of Stacy Woods ("Woods") a white Bassett employee who stated that she found it offensive when black employees were not called by name. (Pl.'s Resp. Ex. H at 38.) However, Woods also

indicated that Lemons always referred to just one person from each table by name and never used the name of the person's partner. (Pl.'s Resp. Ex. H at 27.) Plunkett, another white Bassett employee, stated that she noticed no difference with regard to supervisors calling black and white employees by name. (Def.'s Reply Ex. 6 at 17.)

Horn's third general allegation in support of her hostile environment claim is that no black employees received an invitation to a baby shower for Lemons' daughter. Horn claims that this incident demonstrates that a racially discriminatory hostile environment existed at Bassett. This Court fails to see how the baby shower incident affected a term, condition, or privilege of employment. Moreover, assuming that the facts Horn alleges are true and that no black employees were invited to the baby shower for Lemons' daughter, this incident does not demonstrate that members of one race were exposed to disadvantageous terms or conditions of employment to which members of another race were not exposed because not all white employees in Bassett's cutting room were invited to the shower. Plunkett, a white employee who worked in the cutting room, stated in her deposition that she was not invited to the baby shower. (Def.'s Reply Ex. 6 at 17.) Although Woods, a white employee, stated that she was invited to the shower, Woods also stated that not all white employees were invited to the shower. (Pl.'s Resp. Ex. H at 28.) Therefore, even if true, Horn's allegation regarding the baby shower incident fails to support her claim that a racially discriminatory hostile environment

existed at Bassett.

In addition to concluding that Horn's general allegations of harassment fall far short of the level required to state a Title VII violation, this Court also concludes that it is not clear from the record that Bassett knew of the alleged racially discriminatory hostile environment and failed to take remedial action. Horn states that she complained to Lemons about Lemons' practice of not calling her by name but that the practice persisted. (Pl.'s Resp. Ex. B at 57-58). However, Horn does not state that she complained about Lemons' behavior to Ross, Lemons' immediate supervisor, Peacock, Bassett's personnel manager, or Grimes, Bassett's plant manager. Furthermore, several other witnesses claim that Lemons altered her behavior when it was brought to her attention and that Lemons started to call all employees by name. (Def's Reply Ex. 3, 4.))

Horn also states that when called in to discuss the incident between Marshall and Jones, Horn told Ross and Lemons that the dispute between Marshall and Jones was caused by racial discriminationand tension which existed in the cutting department.

> I told them racial discrimination because we had already– I had already told Jimmie that we all need to get together because there's tension back there and she ignored my warning. I told her, I said, "Ms. Ross, we [are] having problems back there."

(Pl.'s Resp. Ex. B at 75.) However, Horn did not explain in her deposition testimony what day she spoke with Ross, under what circumstances she spoke with Ross, or even what type of problems she was referring to in her conversation with Ross. Again, Horn does not provide specific facts which if true would establish her claims. Furthermore, the evidence in the record indicated that Marshall and Jones do not recall their dispute being caused by racial discrimination or tension nor do they recall Horn being involved in the matter. (Pl.'s Resp. Ex. 2 at 24-25; Def.'s Reply Ex. 3.)

Based upon the foregoing analysis, this Court concludes that Bassett's motion for summary judgment on Horn's § 1981 racially discriminatory hostile environment claim should be and hereby is granted.

2. Constructive Discharge

Horn also alleges that she was constructively discharged due to a racially discriminatory hostile environment at Bassett.

> To constitute a constructive discharge, the employer mus deliberately create intolerable working conditions with the intention of forcing the employee to quit and the employee must quit. The plaintiff can satisfy the intent requirement by demonstrating the [s]he quit as a reasonably foreseeable consequence of the employer's discriminatory actions.
>
> a constructive discharge arises only when a

> reasonable person would find the conditions of employment intolerable. To act reasonably, an employee has an obligation not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged.

Tidwell V. Meyer's Bakeries, Inc., *93* F.3d 490, 494 (8th Cir. 1996) (internal citations omitted).

Because this Court grants Bassett's motion for summary judgment on Horn's hostile environment racial discrimination claim, the Court also grants Bassett's motion for summary judgment on Horn's constructive discharge claim.

3. Racially Discriminatory Discharge

In Bassett's motion for summary judgment, Bassett also asserts that Horn has not established a *prima facie* case to support her claim of racially discriminatory discharge. In the alternative, Bassett claims that Horn has not established that Bassett's proffered reason for Horn's discharge was a pretext for illegal racial discrimination. Therefore, Bassett requests that this Court grant summary judgment on Horn's claim of racially discriminatory discharge. Because this Court concludes that Horn has not produced sufficient admissible evidence from which a rational finder of fact could conclude that Bassett's proffered nondiscriminatory reason for terminating Horn was not the real reason for its conduct and that instead Bassett's

conduct was motivated by intentional discrimination, this Court grants Bassett's request for summary judgment on Horn's discriminatory discharge claim.

This Court will analyze Horn's racially discriminatory discharge claim under the burden shifting framework established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). *See also St. Mary's Honor Ctr. v. Hicks, 509* U.S. 502, 506-08 (1993); *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711,173-15 (1983); *Texas Dep't of Community Affairs v. Burdine, 450* U.S. 248, 252-56 (1981). Under the *McDonnell Douglas* framework, at all times Horn carries the burden of persuasion to show that Bassett's adverse employment action was motivated by intentional discrimination. *Hossaini V. Western Mo. Med. Ctr.,* 97 F.3d 1085,1088 (8th Cir. 1996). However, the burden of production shifts.

First, Horn must present sufficient evidence to establish a *prima facie* case of racial discrimination. She must establish: (1) that she was a member of a protected class; (2) that she was qualified for the position and was satisfactorily performing the duties of the position; and (3) that despite her qualifications, she was displaced from the position. *Ruby v. Springfield R-J2 Public Schl. Dist., 76* F.3d 909, 911 (8th Cir. 1996); *Crimm V. Missouri Pac. R.R. Co.,* 750 F.2d 703, 711 (8th Cir. 1984); *Halsell V. Kimberly-Clark Corp.,* 683 F.2d *285,* 290 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205 (1983). *See also Richmond V. Board of Regents of Univ. of Minn.,* 957 F.2d 595, 598 (8th Cir. 1992)(;'rima *fade* case of discriminatory discharge under

Title VII and § 1981 are identical). Once Horn has established a *prima facie* case by a preponderance of the evidence, Horn has created a rebuttable presumption of discrimination. *Burdine*, 450 U.S. at 254.

The burden of production then shifts to Bassett to rebut the presumption of discrimination by offering a legitimate, nondiscriminatory reason for its conduct. *Ruby*, 76 F. 3d at 911. If Bassett advances a legitimate, nondiscriminatory reason for its conduct, this Court will not second guess Bassett's decision. The Court's purpose is not to sit as a "super-personnel department," reexamining and assessing the correctness or wisdom of Bassett's business decisions. *Krenik v. County of Le Sueur*, 47 F.3d 953, 960 (8th Cir. 1995). Instead, the Court's purpose is to ensure that the reason given by Bassett is legitimate and nondiscriminatory, not a pretext for discrimination.

Finally, Horn may prove that Bassett's proffered reason was a pretext for illegal discrimination. *Ruby*, 76 F.3d at 911. Horn must show sufficient admissible evidence from which a rational finder of fact could conclude that Bassett's proffered nondiscriminatory reason was not the real reason for its conduct and that instead Bassett's conduct was motivated by intentional discrimination. *See Hicks, 509* U.S. at 515; *Lang v. Star Herald*, 107 F.3d 1308, 1311 (8th Cir. 1997). In other words, Horn must *both* prove that Bassett's proffered reason was "false" and suggest that a "discriminatory animus lies behind [Bassett's] neutral explanations." *Roxas V. Presentation College*, 90 F.3d 310, 316 (8th Cir. 1996).

This Court acknowledges that Horn and Bassett dispute whether Horn can present sufficient evidence so as to establish *a prima facie* case of discriminatory discharge. Specifically, the parties disagree as to whether Horn satisfactorily performed the duties of her job at Bassett. Bassett alleges that Horn refused to work overtime at Bassett as required and instead went to work her second job at Cotton Classic. Horn disagrees with these allegations.

The existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law. *Holloway*, 884 F.2d at 366. This dispute over whether Horn satisfactorily performed her job is not outcome determinative. Even if this Court were to assume that Horn satisfactorily performed her job and therefore could establish a *prima facie* case of racially discriminatory discharge, Bassett has articulated a legitimate, nondiscriminatory reason for Horn's termination. Bassett claims that it has a policy which requires employees to sign and acknowledge receipt of disciplinary reports before returning to work. Bassett asserts that Horn received a disciplinary report, refused to sign it, was first suspended, and was thereafter terminated by Bassett for refusing to sign the report.

Despite Horn's claims that she was not aware of the policy prior to this incident and therefore should not be subject to the policy, this Court concludes that Horn was aware of the policy and of its consequences when she refused to sign the disciplinary report. Horn admitted in her deposition testimony

that she fully understood that she could return to work immediately if she would sign and thereby acknowledge receipt of the disciplinary report. Horn admitted that she had been told this on the day of her suspension. (Def.'s Mot. Bx. 1 at 134-35.) Furthermore, Horn also stated in her deposition testimony that after her suspension, she knew that she would not be allowed to return to work at Bassett until she signed the disciplinary report. (Def.'s Mot. Ex. 1 at 139, 146.)

In her response to Bassett's motion for summary judgment, Horn erroneously claims that it is irrelevant that other Bassett employees have been compelled to sign similar disciplinary reports before returning to work. The success of Horn's discriminatory discharge claim depends upon allegations of disparate treatment. To establish disparate treatment, Horn must present sufficient evidence by which a finder of fact could conclude that Bassett's policy requiring employees to sign disciplinary reports before returning to work was applied differently to black employees than to white employees. Therefore, determining whether other employees have been compelled to sign disciplinary reports before returning to work at Bassett is a very relevant inquiry when evaluating Horn's discriminatory discharge claim.

Peacock, the personnel manager at Bassett's Dumas plant, claims that to her knowledge, since implementation of the policy, no employee at Bassett's Dumas plant who has received a disciplinary report has been allowed to return to work without first signing and acknowledging receipt of the report. (Def. '5

Mot. Ex. 2 at 2-3.) Aside from Horn, Bassett maintains that the following six (6) employees initially refused to sign their disciplinary reports: Terri Plunkett ("T. Plunkett"), Vicky Barnett ("Barnett"), Pam Allen ("Allen"), Donna Steverson ("Steverson"), Cindy Patton ("Patton"), and Cindy Shields ("Shields"). (Def. '5 Mot. Bx. 2 at 3.) Of those individuals, four are white and two are black.

T. Plunkett and Barnett, two white employees, received disciplinary reports for refusing to work overtime. Both signed their reports after being told that they would be suspended for three days for refusing to sign. Both also noted in writing on their reports that they disagreed with the contents of the reports. (Def.'s Mot. Bx. 2C, 2D.)

Allen, a black employee who received a disciplinary report for refusing to work overtime, signed the report upon her return from suspension but noted on the report that she did so only because her "job was in jeopardy. Sign or lose [her] job." (Def.'s Mot. Ex. 2E.) Steverson, also a black employee, refused to sign her discipline report until after a three day suspension. (Def.'s Mot. Ex. 2F.)

Patton, a white employee, refused to sign her report, as well. Patton was informed of Bassett's policy, and rather than sign the report, Patton grabbed the report and left the plant, according to Peacock. (Def.'s Mot. Ex. 2 at 3.) Patton's disciplinary report was rewritten after she left the plant with the original. (Def.' Mot. Ex. 2G.) The rewritten report was to be used if Patton returned and signed the report within three (3)

days. Patton did not return. Therefore, according to Peacock, Patton was terminated. (Def s' Mot. Ex. 2 at 3.)
Shields, also a white employee, eventually signed her disciplinary report. (Def.'s Mot. Ex. 2H.) However, according to Peacock, Shields quit her job because she did not think the report was fair. (Def.'s Mot. Ex. 2 at 3.)

These examples illustrate that Bassett applied its policy requiring employees to sign their disciplinary reports before returning to work uniformly and without regard to race. These examples rebut the presumption that Horn's termination was based upon discrimination. Furthermore, Horn has offered no evidence to refute these examples nor has Horn offered sufficient admissible evidence from which a rational finder of fact could conclude that Bassett's proffered nondiscriminatory reason, the fact that Horn refused to sign her disciplinary report, was not the real reason Bassett terminated Horn and that instead Bassett's conduct was motivated by intentional discrimination. Because Horn has failed to refute Bassett's legitimate, nondiscriminatory explanation for Horn's termination, this Court grants Bassett's motion for summary judgment on Horn's discriminatory discharge claim.

4. ADA Claims

In addition, Bassett claims that Horn has not alleged a violation of the ADA. Therefore, Bassett requests that the Court grant summary judgment on Horn's ADA claim. Horn asserts in her complaint that Bassett violated the ADA by not allowing

Horn to take leave to care for her allegedly disabled family members. Horn also asserts that she was terminated from her job at Bassett in violation of the ADA based upon her association with disabled individuals, specifically her taking leave to care for her disabled family members.

The ADA provides that:

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

The term "discriminates" is further defined by 42 U.S.C. § 12112~)(4) to include:

> excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association....

In other words, as the Interpretive Guidelines to the ADA explain, § 121 12(6)(4) is intended to protect any qualified individual, whether or not that individual is disabled, from discrimination because that individual is known to have an

association or relationship with another person known to be disabled. Specifically, § 121 12(6)(4) prohibits an employer from making decisions to hire or fire based upon the belief that a non-disabled individual will have to miss work or frequently leave work early in order to care for another person known to be disabled. *See Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 214 (4th Cir. 1994) (citing 29 C.F.R. § 1630.8, App.).

However, as the Interpretive Guidelines to the ADA also point out, under the ADA, an employer's duty to accommodate applies only to qualified applicants or employees who themselves are disabled. Therefore, § 121 12(1,)(4) does not require that an employer restructure an employee's work schedule so as to accommodate or enable the employee to care for another person with a disability. *See Tyndall*, 31 F.3d at 214 (citing 29 C.F.R. § 1630.8, App.). For this reason, the Court grants Bassett's motion for summary judgment on Horn's claim that Bassett violated the ADA by failing to accommodate her taking leave to care for her disabled family members.

In regard to her discriminatory discharge claim, Horn alleges that Bassett violated the ADA by terminating her based upon her association with disabled family members, specifically her having to take leave to care for her allegedly disabled family members. To state a *prima facie* case alleging a violation of the ADA under § 121 12(6)(4) based upon discriminatory discharge, Horn must establish that:

(1) she was in the protected class; (2) she

> was discharged; (3) at the time of the discharge, she was performing her job at a level that met her employer's legitimate expectations; and (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

See Ennis v. National Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55, 53 (4th Cir. 1995) (relying on *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994); *Smith V. Burton*, 914 F.2d 1330, 1340 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991)). To establish that she was in a protected class, Horn must establish that her family members have "disabilities" recognized under the ADA and that their disabilities were "known" to Bassett at the time of Horn's discharge. *See Ennis*, 53 F.3d at 59. *See also* 42 U.S.C. § 12102(2) (defining "disability" under the ADA).

This Court acknowledges that the parties disagree as to whether Horn can establish a *prima facie* case of discriminatory discharge under the ADA. However, assuming for the purpose of analysis that Horn can establish a *prima facie* case of discriminatory discharge under the ADA, this Court finds no merit in Horn's argument that Bassett violated the ADA by terminating Horn because she took leave to care for her disabled family members. As stated in the Interpretive Guidelines to the ADA, § 12112 (b)(4) only prevents an employer from making decisions based on the *belief* that an emp~yee would have to

miss work to take care of a disabled person. *See Tyndall*, 31 F.3d at 214 (citing 29 C.F.R. § 1630, App.).

In this case, assuming the facts that Horn alleges are true, Bassett did not terminate Horn based on a *belief* or *unfounded assumption* regarding Horn's having to miss work to care for her disabled family members. Rather, if Bassett did terminate Horn for having to take leave to care for her disabled family members, Bassett responded to Horn's record of past absences in connection with caring for her family members. In other words, Bassett terminated Horn based upon fact, Horn's record of past absences. (Def.'s Mot. Ex. 2A, 2B.) This Court concludes that Bassett's terminating Horn on this basis does not violate §12112(6)(4) of the ADA. *See Tyndall*, 31 F.3d at 214.

Furthermore, the burden shifting framework established in the *McDonnell Douglas* line of cases applies to discriminatory discharge claims under the ADA. *See Price V. S-B Power Tool*, 75 F.3d 362, 364-65 (8th Cir. 1996). Therefore, assuming Horn could establish a *prima facie* case of discriminatory discharge, Bassett would have the opportunity to come forward with a legitimate, nondiscriminatory reason for terminating Horn. Then, Horn would have to prove that Bassett's proffered reason was pretextual and that intentional discrimination was the true reason for Horn's termination. *Price*, 75 F.3d at 365.

In this case, Bassett has proffered a legitimate, nondiscriminatory reason for terminating Horn, Horn's refusal to sign and acknowledge receipt of the disciplinary report. Bassett has presented evidence that it uniformly applied its

policy requiring employees to sign their disciplinary reports before returning to work. This evidence rebuts any allegation that Horn's termination was based upon discrimination. Furthermore, Horn has not offered sufficient admissible evidence from which a rational finder of fact could conclude that Bassett's proffered nondiscriminatory reason, the fact that Horn refused to sign her disciplinary report, was not the real reason Bassett terminated Horn and that instead Bassett's conduct was motivated by intentional discrimination in violation of the ADA.

Therefore, because this Court concludes that § 12112(b)(4) does not require that an employer restructure an employee's work schedule so as to accommodate or enable the employee to care for another person with a disability, this Court grants Bassett's motion for summary judgment on Horn's claim that Bassett violated the ADA by failing to accommodate her taking leave to care for her disabled family members. In addition, this Court concludes that Bassett's decision to terminate Horn did not constitute discrimination based on Horn's association with allegedly disabled individuals and that, in any event, Horn has failed to refute Bassett's legitimate, nondiscriminatory explanation for Horn's termination. Therefore, this Court grants Bassett's motion for summary judgment on all of Horn's ADA claims.

5. FMLA Claims

In addition, Horn alleges that Bassett violated the FMLA's notice provisions because Bassett's FMLA policy was

not published in its handbook. Horn also alleges that Bassett violated the FMLA when it terminated her on the basis of excessive absences because she was an FMLA-qualified employee and all of her absences were FMLA-qualified, as well. Bassett asserts that Horn has not alleged a violation of the FMLA. Bassett maintains that there is no private right of action for an alleged violation of the FMLA's notice provisions and that Horn has not established a *prima facie* case to support the remainder of her FMLA claim. Therefore, Bassett requests that the Court grant summary judgment on both of Horn's FMLA claims.

Based upon the statutory language of the FMLA and certain corresponding regulations promulgated by the Department of Labor, the FMLA applies only to "eligible employees" as defined by 29 U.S.C. § 2611(2) and covers only "employers" as defined by 29 U.S.C. §2611(4). Under certain circumstances, the FMLA provides eligible employees up to twelve (12) weeks of unpaid leave per year, including "intermittent leave," in which to recover from a "serious health condition" or to care for a close family member with such a condition. 29 U.S.C. § 2612(a). *See also* 29 C.F.R. § 825.203 (defining intermittent leave); 29 C.F.R. § 825.114 (defining serious health condition).

An employee may be eligible for FMLA leave if the employee "has been employed for at least 12 months by the employer with respect to whom leave is requested...." 29 U.S.C. § 261 l(2)(A)(i). The twelve (12) month determination "must be

made as of the date leave commences." 29 C.F.R. § 825.110(d). In the case at bar, the parties do not dispute the fact that Horn became eligible for FMLA leave while employed by Bassett on or about August 15, 1995. The parties also apparently do not dispute the fact that Bassett is an employer for purposes of the FMLA.

In regard to Horn's first allegation that Bassett has violated the notice provisions of the FMLA, § 2617(a) authorizes an eligible employee to bring a civil action against an employer for violations of § 2615 only.[6] 29 U.S.C. § 2617(a). The notice provisions are in § 2619 of the FMLA. Accordingly, an eligible employee has no basis to seek relief in a civil action for alleged violations of the notice provisions in § 2619.

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[6] 29 U.S.C. § 2615 provides as follows:

(a) Interference with rights. (1) Exercise of rights.

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2)has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.

Instead, based upon the language of the statute, it is the Secretary of Labor who may maintain an action and seek a civil money penalty for willful violations of the FMLA's notice provisions. 29 U.S.C. § 2619(6); 29 C.F.R. § 825.404. *See also Blumenthal v. Murray*, 946 F.Supp. 623, 626-27 (N.D. Ill. 1996); *Jessie v. Carter Health Care Ctr., Inc.*, 926 F.Supp. 613, 617 (E.D. Ky. 1996); *Hendry* v. *GTE N., Inc.*, 896 F.Supp. 816, 828 (N.D. Ind. 1995).

Based upon the foregoing analysis, this Court concludes that there is no private right of action for alleged violations of the FMLA's notice provisions. Therefore, this Court grants Bassett's motion for summary judgment on Horn's claim regarding the FMLA's notice provisions.

In regard to Horn's remaining allegation that Bassett violated the FMLA when it terminated her on the basis of excess absences, this is essentially a claim for retaliatory discharge. There are two provisions in the FMLA which prohibit an employer from retaliating

against an employee, § 2615(a)(2) and § 2615(b). Although neither of these two provisions specifically address retaliatory discharge, 29 C.F.R. § 825.220(c) interprets these two provisions as prohibiting employers from discriminating against employees who have taken FMLA-qualified leave and from considering the taking of FMLA-qualified leave as a negative factor in employment actions, such as the hiring, promoting, or disciplining of employees. *See Dodgens v. Kent Mfg. Co.*, 955 F.Supp. 560,565 (D.S.C. 1997).

Having determined that the FMLA provides a cause of action based on allegations of retaliatory discharge, this Court now must determine what Horn must establish to state a claim of retaliatory discharge based upon a violation of the FMLA. Because the FMLA was enacted fairly recently, case law is still developing with regard to the statute.[7] As a result, not all courts agree as to what an employee must establish to prove a violation of the FMLA. However, the majority of courts that have examined FMLA claims like the one currently before this Court have applied, or have indicated that they would apply, the Title VII analysis for retaliatory discharge and the burden shifting framework set forth in the *McDonnell Douglas* line of cases. *See, e.g., Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1325 (10th Cir. 1997); *Dodgen*, 955 F.Supp. at 565-66; *Kaylor v. Fannin Reg'l Hosp., Inc.*, 946 F.Supp. 988, 999-1001 (N.D. Ga. 1996); *Lempres v. CBS Inc.*, 916 F.Supp. 15, 23 n.37 (D.D.C. 1996); *Urbano v. Continental Airlines, Inc.*, No. Civ. A. H-95-3508, 1996 WL 767426 (S.D. Tex. Nov. 1, 1996)(unpublished); *Oswalt v. Sara Lee Corp.*, 889 F.Supp. 253, 259 (N.D. Miss. 1995), *aff'd*, 74 F.3d 91 (5th Cir. 1996); *McCown v. UOP, Inc.*, No.94 C 2179, 1995 WL 519818 (N.D. Ill. Aug.30, 1995)(unpublished). *But see McClain V. Southwest Steel Co.*, 940 F.Supp. 295, 299 n.2 (N.D Okla. 1996) (refusing to apply

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[7]The FMLA took effect August 5, 1993, and is not retroactive. 29 C.F.R. § 825.103(a). *See also Oswalt v. Sara Lee Corp.*, 889 F.Supp. 253, 258 n.4 (N.D. Miss. 1995), *aff'd*, 74 F.3d 91, 93 (5th Cir. 1996).

the standards set forth under Title VII and the *McDonnell Douglas* line of cases to FMLA claims).

Although the Eighth Circuit Court of Appeals has not addressed this issue, this Court will adopt the well-reasoned approach taken by a majority of the other courts that have examined this issue and will apply the standards set forth under Title VII and the *McDonnell Douglas* line of cases to Horn's FMLA claim of retaliatory discharge. Consistent with this approach, Horn must establish a *prima facie* case of FMLA discrimination. Then, Bassett has the opportunity to show a legitimate, nondiscriminatory reason for terminating Horn. Finally, in order to prevail, Horn must present sufficient admissible evidence to show that Bassett's proffered reason is merely pretextual and that intentional discrimination was the real reason for Horn's termination. *Kaylor*, 946 F.Supp. at 1000.

To establish a *prima facie* case of FMLA discrimination, Horn must show that: (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the two actions. *Morgan*, 108 F.3d at 1325. *See also Dodgens*, *955* F.Supp. at 566; Oswalt, 889 F.Supp. at 259. To prove that she properly availed herself of a protected right under the FMLA, Horn must pass through a series of substantive and procedural requirements defined by the statute. As stated, the parties do not dispute the fact that Horn was an eligible

employee under the FMLA as of August *15*, 1995.[8]

The FMLA entitles an eligible employee to twelve (12) workweeks of leave during any twelve (12) month period "to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." 29 U.S.C. § 2612(a)(l)(c). More specifically, the FMLA provides that an eligible employee may take "intermittent" leave, which allows an employee leave to provide care or psychological comfort to an immediate family member with a serious health condition. 29 U.S.C. § 2612. *See also* 29 C.F.R. § 825.203 (defining intermittent leave).

To establish that she was qualified to take intermittent leave under the FMLA, Horn must establish that:

(1) the leave she took was "needed to care for" a "spouse, parent, son, or daughter" with a "serious health condition," *see* 29 U.S.C. §§ 2612(a)(1)(c), 2612(c)(2);

(2) Horn made a reasonable effort to schedule foreseeable treatments so as not to "disrupt unduly" Bassett's operations, *see* 29 U.S.C. § 2612(e)(2)(A); 29 C.F.R.

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[8] This Court agrees with Bassett's assertion that because Horn was not a FMLA-eligible employee prior to August 15, 1995, any days Horn was absent from work at Bassett prior to August 15, 1995, were not days Horn was eligible for FMLA-qualified leave. (*See* Def's Reply at 11-13.) Therefore, Horn's absences from work prior to August 15, 1995, are not at issue in this case with respect to Horn's FMLA claim. *See also* 29 C.F.R. § 825.103(a).

§825.117; and

(3) Horn must have given Bassett the appropriate notice as required by the FMLA of her intent to take such leave, *see* 29 U.S.C. § 2612(e)(2)(B).

The phrase "needed to care for" is further defined by 29 C.F.R. § 825.116. Similarly, the terms "spouse, parent, son, or daughter" are defined by 29 C.F.R. § 825.113. The phrase "serious health condition" is also defined by the FMLA, its accompanying regulations, and its legislative history. 29 U.S.C. § 2611(11); 29 C.F.R. § 825.114; H.R. Rep. No.8, 103rd Cong., 1st Sess., pt. 1 at 29 (1993); U.S. Code Cong. & Admin. News 1993 at 3, 31. *See also Boyce v. New York City Mission Soc'y*, No.96 Civ. 2480 (DAB), 1997 WL 232511 (S.D.N.Y. May 5, 1997).

The amount of notice Horn was required to give Bassett regarding her intent to take leave would have depended upon whether the leave was foreseeable or unforeseeable. 29 C.F.R. § 825.302 (foreseeable leave); 29 C.F.R. § 825.303 (unforeseeable leave). Furthermore, in this case, Horn has asserted that she did not know about the FMLA. Therefore, presumably, Horn will claim that because she did not know about the FMLA and because Bassett failed to provide her with adequate notice of the FMLA, Horn's failure, if any, to follow the FMLA's notice procedures should be excused. 29 C.F.R. § 825.304. *See also Hendry*, 896 F.Supp. at 828.

This Court acknowledges that Bassett disputes Horn's

ability to establish a *prima facie* case. Bassett challenges Horn's claim that she properly availed herself of FMLA-qualified leave. More specifically, Bassett challenges Horn's assertion that the leave she took was necessary to care for her family members; challenges Horn's assertions that her mother, son, and/or daughter are suffering from serious health conditions; and questions whether Horn made a reasonable effort to schedule foreseeable treatment so as not to disrupt Bassett's schedule. Bassett also maintains that by posting a notice regarding the FMLA on a bulletin board at the plant, Bassett provided Horn with adequate notice and thereby triggered Horn's requirement to notify Bassett of her intent to take leave as required by the FMLA. Furthermore, Bassett challenges Horn's assertion that a causal connection exists between Horn's taking FMLA-qualified leave and Horn's termination.

Assuming for the purpose of analysis that Horn can establish a *prima facie* case of retaliatory discharge under the FMLA, this Court determines that Bassett has proffered a legitimate, nondiscriminatory reason for terminating Horn, Horn's refusal to acknowledge receipt of the disciplinary report. Once again, this evidence rebuts any allegation that Horn's termination was based upon discrimination. Horn has not offered sufficient admissible evidence from which a rational finder of fact could conclude that Bassett's proffered nondiscriminatory reason was not the real reason Bassett terminated Horn and that instead Bassett's conduct was motivated by intentional discrimination in violation of the

FMLA. Therefore, this Court grants Bassett's motion for summary judgment on Horn's claim alleging retaliatory discharge in violation of the FMLA.

In regard to both of Horn's FMLA claims, this Court grants Bassett's motion for summary judgment. Because this Court concludes that there is no private right of action for alleged violations of the FMLA's notice provisions, this Court grants Bassett's motion for summary judgment on Horn's claim regarding the FMLA's notice provisions. Furthermore, because Horn has failed to offer sufficient admissible evidence from which a rational finder of fact could conclude that Bassett's proffered nondiscriminatory reason for Horn's termination was pretext and that instead Bassett's conduct was motivated by intentional discrimination, this Court also grants Bassett's motion for summary judgment on Horn's claim alleging retaliatory discharge in violation of the FMLA.

C. Horn's Employment with Bassett during 1993

In Horn's response to Bassett's motion for summary judgment, Horn for the first time alleges that her voluntary separation from employment with Bassett in 1993 violated the FMLA, Title VII, and 42 U.S.C. § 1981.[9]

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[9] As Bassett has pointed Out, Horn did not allege in her complaint any claims based upon her voluntary separation from employment in 1993. *See* Docket No.1. To date, Horn has not amended her complaint to include such claims. Instead, Horn

In her statement of material fact in support of her response to Bassett's motion for summary judgment, Horn stated as follows:

> In November, 1993, during her first period of employment, Horn suffer[ed] with hypertension. In an attempt to treat the problem, she decided to resign her position. The FMLA was law at that time. As well, the defendant had an internal policy to extend leave of absence for medical reasons to employees. Prior to and upon resignation, the plaintiff was not extended any medical leave under either policy. In fact, management never offered nor mentioned a leave of absence to her, in spite of its knowledge of her illness.

(Pl.'s Resp. at 1 (internal citations omitted).)

Furthermore, in Horn's deposition, she stated that she left Bassett voluntarily in 1993 because of her health problems, specifically her high blood pressure. Horn stated that she did not think her leaving Bassett in 1993 was in any way racially discriminatory, although she was not sure if Bassett discriminated against her at the time based upon her health problems. (Pl.'s Resp. Ex. B at 38.)

After careful consideration, this Court concludes that

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first made clear that she intended to raise such claims after the discovery deadline and approximately two weeks prior to the scheduled trial date of June 2, 1997. *(See* Pl.'s Rejoinder.)

Horn may not allege a violation of the FMLA or Title VII based upon the 1993 events. This Court also concludes that Horn has failed to state a *prima facie* case of racial discrimination under § 1981 based upon the 1993 events. Therefore, Bassett is granted summary judgment on all of Horn's claims regarding her employment with Bassett in 1993.

1. FMLA Claim

This Court concludes that Horn may not allege a violation of the FMLA based upon her voluntary separation from Bassett's employment in 1993. As previously explained, the FMLA applies only to "eligible employees" as that term is defined under the FMLA. 29 U.S.C. § 261 l(2)(i). Horn herself admits and the undisputed evidence before the Court indicates that at the time Horn left Bassett's employment in 1993, she was not an eligible employee under the FMLA. Therefore, Horn may not attempt to sue Bassett now under the FMLA based upon the 1993 allegations.

2. Title VII Claim

This Court also concludes that Horn may not sue Bassett under Title VII based upon her voluntary separation from employment in 1993. Generally, prior to filing suit in federal court, an individual must exhaust Title Vii's administrative remedies. In most cases, to exhaust Title Vii's administrative remedies, an individual must: (1) timely file a charge of discrimination with the EEOC setting forth the facts

and nature of the charge within one hundred eighty (180) days of the discrimination and (2) receive notice from the EEOC of the right to sue. 42 U.S.C. § 2000e-5(b), (c), (e). *See also Williams*, 21 F.3d at 222. Once an individual receives an EEOC right to sue letter, the individual has ninety (90) days in which to file suit. 42 U.S.C. § 2000e-5(f)(1). Typically, the plaintiff attaches the EEOC letter to his or her complaint and incorporates a paragraph in the complaint which states that the statutory requirements of 42 U.S.C. § 2000e have been met.

However, "filing a timely charge of discrimination with the EEOC is not a jurisdiction prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Similarly, "the ninety-day limitation period of 42 U.S.C. § 2000e-5(f)(l) is not a jurisdictional prerequisite to federal suit and is, therefore, subject to equitable tolling in appropriate circumstances,' as well. *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989). Application of the doctrine of equitable tolling is generally reserved for circumstances when the delay was "truly beyond the control of the plaintiff." *Id.* at 1124 n.2 (citing cases in which the doctrine of equitable tolling has been applied).

After reviewing the record in the case at bar, this Court concludes that Horn's Title VII claim against Bassett based upon her voluntary separation from employment in 1993 is barred for failure to exhaust Title Vii's administrative remedies. Horn failed to mention facts regarding the 1993 events in her complaint filed

some three years after the events allegedly occurred, failed to state in her complaint that Title VII's administrative remedies had been exhausted, failed to attach to her complaint a right to sue letter from the EEOC regarding her 1993 allegations, and failed to argue that she is entitled to waiver, estoppel, or equitable tolling of Title VII's administrative requirements. Therefore, this Court concludes that Horn's Title VII claim regarding the 1993 events is barred.

3. 42 U.S.C. § 1981 Claim

After reviewing the record, this Court concludes that Horn has failed to state a prima facie case of racial discrimination based upon the 1993 events. Therefore, this Court grants Bassett's motion for summary judgment on Horn's claim brought pursuant to 42 U.S.C. §1981 and alleging discriminatory terms and conditions of employment based upon the 1993 events.

This Court concludes that the burden shifting framework established in the *McDonnell Douglas* line of cases applies to this claim. *Barge V. Anheuser-Busch, Inc.*, 87 F.3d 256, 258 (8th Cir. 1996). To establish a *prima facie* case of racially discriminatory terms and conditions of employment, Horn must show: (1) that she is a member of a protected class; (2) that she was qualified for the position; (3) that she suffered some type of adverse employment action; and (4) some evidence that would allow the inference of improper motivation. *Id.* In order to prove the fourth prong of her case, Horn must prove

that similarly situated white employees were given preference over her with respect to being granted extended leave pursuant to Bassett's own leave of absence policy. *Id.* at 259.

Bassett may rebut Horn's *prima facie* case and the corresponding presumption of discrimination by offering a legitimate, nondiscriminatory reason for not granting Horn extended leave in 1993. *Id.* Of course, Horn may produce sufficient admissible evidence to prove that Bassett's proffered reason for not granting her leave in 1993 is false and that Bassett's decision was instead motivated by intentional discrimination.

After reviewing the record, this Court concludes that Horn has failed to state a *prima facie* case of racial discrimination under § 1981 based upon the 1993 events. The undisputed evidence as presented in Horn's own deposition indicates that she left Bassett in 1993 due to her high blood pressure. She did not believe that her leaving in 1993 was motivated in any way by racial discrimination. (Pl.'s Resp. Ex. B at 38.)

In an attempt to salvage this claim, Horn's attorneys point to Bassett's record regarding leaves of absence granted from October of 1993 to February of 1996 and allege that because more white employees were granted leaves of absence under Bassett's policy, this policy was applied in a racially discriminatory manner. (Def.'s Mot. Ex. 2J.) However, no evidence in the record establishes Bassett's ratio of black employees to white employees. Without such evidence, this

Court will not infer that a disproportionate number of white employees were granted leaves of absence at Bassett and will not infer that Horn's leaving Bassett in 1993 was in any way motivated by racial discrimination. Therefore, this Court concludes that Horn has failed to state a *prima facie* case of racial discrimination under § 1981.

For the foregoing reasons, this Court grants Bassett's motion for summary judgment on Horn's FMLA claim, Title VII claim, and § 1981 claim regarding the terms and conditions of Horn's employment with Bassett in 1993.

III.

In conclusion, in regard to Horn's employment with Bassett from 1994 to 1995, this Court grants Bassett's motion for summary judgment on Horn's § 1981 hostile environment racial harassment claim and Horn's constructive discharge claim. Moreover, this Court grants Bassett's motion for summary judgment on Horn's racially discriminatory discharge claim, on Horn's ADA claims, and on Horn's FMLA claims. In regard to Horn's employment with Bassett in 1993, this Court grants summary judgment on Horn's FMLA Claim, Title VII claim, and § 1981 claim.

Because Bassett's motion for summary judgment has been granted as to all of Horn's claims, there are no remaining issues for trial. The case is hereby dismissed, and judgment will be entered accordingly.

IT IS SO ORDERED THIS 18th day of June 1997.

/s/: Susan Webber Wright
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Date of Entry: June 19, 1997

BEVERLY HORN,	*	
Plaintiff	*	
	*	
vs.	*	**No. PBC-96-413**
	*	
BASSETT FURNITURE	*	
INDUSTRIES, INC.,	*	
Defendant.	*	

JUDGMENT

Pursuant to the Order entered in this matter on this date, it is Considered, Ordered, and Adjudged that this case be and is hereby dismissed; the relief sought is denied Judgment is hereby entered for defendant Bassett Furniture Industries, Inc.

IT IS SO ORDERED THIS 18th day of June 1997.

/s/: Susan Webber Wright
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3887

Beverly Horn,	*	
Appellant,	*	
	*	Appeal from the United
vs.	*	States District Court for
	*	the Eastern District of
Bassett Furniture	*	Arkansas
Industries, Inc.,	*	
Appellee.	*	[UNPUBLISHED]

Submitted: April 15, 1998
Filed: June 26, 1998

Before LOKEN and LAY, Circuit Judges, and PRATT,[1] District Judge.
PER CURIAM

Beverly Horn appeals from a final judgment entered in the United States District Court for the Eastern District of Arkansas,[2] granting summary judgment in favor of Bassett

[1] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

[2] The Honorable Susan Webber Wright, United States District Court Judge.

Furniture Industries, Inc., on Horn's claims of race discrimination and hostile work environment in violation of Title VII, disabilitv discrimination in violation of the Americans with Disabilities Act, and violation of the Family and Medical Leave Act. We review the district court's grant of summary judgment de novo. *See Hanenburg v. Principal Mut. Life Ins. Co.*, 118 F.3d 570, 573 (8th Cir. 1997); *Barge v. Anheuser-Busch, Inc .*, 87 F.3d 256, 258 (8th Cir. 1996).

Having considered the record and the parties' submissions, we conclude that the district court properly granted summary judgment and therefore affirm, for the reasons stated by the district court in its Memorandum and Order of June 19, 1997. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3887EALR

Beverly Horn, *
Appellant, *
*
vs. *
*
Bassett Furniture *
Industries, Inc., *
Appellee. *

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 28, 1998

Order Entered at the direction of the Court:
/s/: Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
NOV 25 1998
CLERK

No. 98-696

In The

Supreme Court of the United States

October Term, 1998

BEVERLY HORN,

Petitioner,

v.

BASSETT FURNITURE INDUSTRIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW AND DISCLOSURE PURSUANT TO RULE 29

Beverly Horn is Petitioner. Respondent is Bassett Furniture Industries, Inc. Pursuant to Supreme Court Rule 29, Bassett Furniture Industries, Inc. refers this Court to pages ii-iii of its Brief of Appellee filed with the Court of Appeals for the Eighth Circuit (Corporate Disclosure Statement and Certificate of Interested Parties).

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STATEMENT OF THE CASE[1]

This case was brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 *et seq.* ("Title VII"), 42 U.S.C. § 1981 ("Section 1981"), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA"), and the Family and Medical Leave Act of 1993, 29 U.S.C.A. § 2601 *et seq.* ("FMLA"). Petitioner Horn asserted claims of race discrimination, and claims under the ADA and the FMLA. Respondent Bassett Furniture Industries, Inc. ("Bassett") moved for summary judgment on all of Horn's claims. The motion was granted by United States District Judge Susan Webber Wright, and judgment entered dismissing the case, on June 18, 1997. On June 26, 1998, the United States Court of Appeals for the Eighth Circuit affirmed, per curiam, by an order issued pursuant to Eighth Circuit Local Rule 47B, for the reasons stated in Judge Wright's Memorandum and Order. On July 28, 1998, the Court also denied Horn's petition for rehearing by the panel and suggestion for rehearing en banc.

Horn's employment with Bassett Horn first went to work for Bassett in August, 1993, in the cutting room of Bassett's Upholstery Plant No. 5 in Dumas, Arkansas. Her immediate supervisor was Katie Lemons, and Lemons's immediate supervisor was Jimmie Ross. Horn left her employment with Bassett for the first time several months later, in November, 1993.

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[1] Pursuant to Supreme Court Rule 15, Bassett's Statement of the Case corrects misstatements of fact set forth in the Petition.

Around May of 1994, Kathryn Peacock, the Personnel Manager at Bassett, saw Horn and encouraged her to return to work at Bassett. While Horn was visiting the plant in August 1994, Ross asked her if she was interested in coming back to work at Bassett. Ultimately, although Bassett was not trying to fill a vacancy, Bassett rehired Horn, and did so at a higher rate of pay than its new-hire rate.

Normal working hours in the cutting room where Horn worked are 7:00 a.m. to 3:30 p.m. However, it sometimes is necessary for employees to work overtime. Because of the nature of Bassett's business and overtime requirements, oftentimes it is not known until late during a particular shift that overtime will be required at the end of the shift. Applicants approved for positions in the cutting room are informed during the interview process that availability to work as many as 10 hours per day, 6 days per week is a requirement of the job. Horn knew of this requirement. In addition, Bassett's Employee Handbook, which Horn read when she began her employment with Bassett, provides that "[a]ll employees are expected to work the hours as scheduled in their department for their particular job." The cutting room began to work a substantial amount of overtime around the first part of September, 1995. Throughout September, Horn generally worked the same hours (including overtime) as other employees in the department.

Horn's second job and refusal to work overtime

Unbeknownst to Bassett, Horn obtained a job at Cotton Classing in Dumas around the first of October, 1995. Horn's shift at this second job began at 4:00 p.m. Thereafter she began to refuse to work overtime at Bassett. In

particular, she refused to work overtime as assigned on October 4, 9, and 10, 1995.

When questioned about her refusal to work overtime, Horn told Ross and Lemons that Horn's mother was keeping her children during the day and that, because her mother was "getting old," it was unfair for her mother to have to keep the children past 3:30 p.m. Lemons told Horn that she would have to get a baby-sitter and that she would have to start working the required overtime. Horn understood that Bassett needed her to work the overtime hours.

At least three times during her deposition in this case Horn changed her explanation of why she refused to work overtime. Horn initially stated that she left Bassett every day at 3:30 in order to pick up her children at her mother's house and to baby-sit the children, because she had no baby-sitter. Horn later testified that she could work only until 3:30 at Bassett because she was "stressed and pressured" by her job and that was "all [she] could bear." However, Horn ultimately admitted that *she refused to work overtime at Bassett so that she could go to her second job.* (Question: "[T]he fact is that you refused to work overtime at Bassett so that you could go to this job at Cotton Class[ing], didn't you?" Answer: "Yes.")

The Discipline Report On October 19, Ross and Lemons called Horn to the office to meet with her. During the October 19 meeting, Ross and Lemons issued Horn a Discipline Report, citing Horn on three different grounds: "Dependability – Excessive Absences/Tardies," "Attitude – Threats – Intimidate Other Employees," and "Stirring Up Trouble Among People Instead of Working." The

"Dependability – Excessive Absences/Tardies" notation had to do with Horn's refusal to work overtime as directed and needed by Bassett.[2] According to Lemons, the "Stirring Up Trouble" notation had to do with Lemons's perception that Horn acted disgruntled when Lemons talked to her. The "Attitude – Threats – Intimidate Other Employees" had to do with Horn making a remark to Ross and Lemons that Lemons was lucky that Horn did not stab Lemons with a pair of scissors.

Bassett maintains a policy requiring employees to acknowledge receipt of a Discipline Report by signing the report. Neither the Plant Manager, the Human Resources Manager, Horn's first-line supervisor, nor Horn's second-line supervisor are aware of *any* employee at Bassett's Dumas plant who, since the implementation of this policy, has received a Discipline Report and been allowed to return to work without signing the report. Horn, however, refused to sign the report.

Ross and Lemons explained to Horn that by signing the report she was not agreeing with the contents of the report, but merely was acknowledging that she had been presented with it. Ross and Lemons also explained to Horn that she could write her version of events on the report and that she could note on the report anything

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[2] While much of Horn's Petition focuses on Horn's attendance generally, the "Absences" portion of the disciplinary report was based on her absences on the days in October 1995 on which she refused to work overtime so she could attend her second job. Thus, Horn's references to earlier absences are both irrelevant and misleading, for the record indicates it was her refusal to work overtime in October that was the basis for the discipline report.

with which she did not agree. (There is a space on the report specifically for employees to use to write their version of events, any disagreement with the report, *etc.* The back of the report may also be used for this purpose.) Horn still refused to sign the report. Ross and Lemons then explained that if Horn did not sign the report she would be suspended for up to three days. They also explained that, after the three-day suspension, if Horn persisted in refusing to sign the report her employment would be terminated. Horn still refused to sign the report, and was thereafter suspended.

Horn returned after the three day suspension still unwilling to sign the report. This time, Horn spoke with Peacock. Peacock again explained to Horn that, by signing the report, Horn was not admitting that she was guilty of the conduct described therein but merely was acknowledging that she had been shown the report. Also, Peacock explained to Horn that Horn had the right to write her version of events on the report and to note specifically that she did not agree with the contents of the report. Horn still refused to sign the report. Horn admitted that prior to her separation of employment she was aware that she would not be allowed to return to work until she signed the report.

There is a dispute about what happened next. Horn states that she offered to sign the report if the notations about stirring up trouble and intimidation were removed. But Peacock and Ross also testified that Peacock offered to remove the "stirring up trouble" and "threats" notations from the report if Horn would agree to sign it with

those notations removed.[3] Horn still refused. Peacock offered to allow Horn to discuss the matter with other members of management. Horn declined. Peacock then spoke with Scottie Grimes, the plant manager. Grimes and Peacock agreed that Bassett had done all it reasonably could do to salvage Horn's employment. Peacock then told Horn that she was excused and that, because of her refusal to sign the report, Bassett would consider her to have quit her job.[4]

Horn's Charge and Complaint – Horn, represented by counsel, filed a Charge of Discrimination (hereinafter

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[3] Horn suggests that Bassett refused to strike certain notations in her disciplinary report, even though it prepared an alternative disciplinary report for another employee in an unrelated incident. First, whether Bassett refused to strike any of the notations in Horn's report is disputed – Bassett representatives testified that an offer was in fact made to Horn to strike a portion of her disciplinary report if she would sign it. Next, as the District Court held, the record demonstrates Bassett has been consistent with *all* employees and has not allowed *any* disciplined employee to return to work without first signing the disciplinary report. The record demonstrates that when the other employee referred to by Horn was presented with the disciplinary report, she left the Bassett plant and took the report with her. A new report was written to be presented to her in the event she ever returned (she did not). That employee was thus treated the same as Horn and every other Bassett employee who has received a disciplinary report. As the District Court concluded, Bassett applied its policies to all employees without regard to race.

[4] For ease of reference, this event is described herein as Horn's termination, even though that description is not an entirely accurate description of the end of her employment at Bassett.

"charge") with the Equal Employment Opportunity Commission (hereinafter "EEOC") on March 7, 1996. The text of Horn's charge reads as follows:

> I am a black female American citizen; and I am the mother of children who are disabled. On or about October 28, 1995, my employer fired me when a disturbance, in which I was not involved, arose in my work area between white and black employees. I was accused by my supervisors, Katie Lemons and Jimmie Ross, of stirring up trouble and was fired. I believe that I was fired because of my race. Also, I had been allowed excused absences to take care of my children. However, I was also told that I was being fired because I had missed too much time off caring for my children. I believe that I was fired due to disability and due to race. It is also my belief that my employer violated the Family and Medical Leave Act when I was terminated.

On May 22, 1996, the EEOC issued a pre-determination letter on Horn's charge. In that letter, the EEOC stated, *inter alia:*

> The evidence indicates that you were fired from your position for insubordination for refusing to acknowledge, through signature, a Disciplinary Report even though it was explained to you that your signature did not constitute a confession or admission to the allegations in the report. Further, you were told that the disciplinary report provided you protection as well since you had the opportunity to state your position and/or account of events on the disciplinary report.
>
> Also, there is no evidence of record to show that your Employer was aware that your children were disabled.

The EEOC also invited Horn to provide it with any further evidence in support of her charge, but Horn submitted nothing else. The EEOC then issued a determination on Horn's charge in which it stated that it was unable to conclude that Bassett had violated Title VII or the ADA.

REASONS TO DENY THE WRIT

Review on a writ of certiorari is a matter of this Court's discretion and not one of right. Pursuant to this Court's Rules, a petition will be granted only when there are special and important reasons for doing so, such as when a Court of Appeals decides an important federal question in a way that conflicts with another Court of Appeals, or when a Court of Appeals so far departs from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, that an exercise of the Supreme Court's supervisory power is called for. SUP. CT. R. 10. The questions presented in this case do not satisfy any of these criteria.

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HORN HAS NOT ESTABLISHED THAT THE LOWER COURTS' DECISIONS CONCERN ISSUES OF NATIONAL IMPORTANCE.

The present case is a fact-driven "garden variety" employment discrimination case where a former employee has alleged numerous employment discrimination claims against her former employer, claims that were summarily dismissed by the trial court. The courts below

applied settled case law to an unremarkable fact pattern, a combination that does not offer fertile ground for resolving any issues of national interest. There are no facts present, or no new statement of law or construction of existing precedent that are of interest to anyone other than the present parties. The errors alleged throughout by Horn are claimed errors in fact-finding and in the misapplication of properly stated rules of law. Furthermore, because this case was disposed of by a summary judgment evaluating fact-specific claims, the unpublished opinion likely will be of little importance to the national body of law. This case simply does not provide this Court with a useful opportunity to address any issues of national importance, and thus does not provide any special and important reasons for granting certiorari.

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HORN HAS NOT ESTABLISHED THAT THE LOWER COURTS HAVE SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER.

Petitioner notes that the court of appeals affirmed for the reasons stated in the district court's Memorandum and Order. She suggests that by affirming the district court pursuant to Eighth Circuit Local Rule 47B, the court of appeals did not conduct a *de novo* review of the summary judgment as required. But the method by which a court reviews a ruling below and reaches a judgment is different from how it communicates its ultimate decision.

The practice of affirming summary judgment orders pursuant to Local Rule 47B is far from being a substantial departure from accepted and usual judicial proceedings. In fact, a Westlaw search in the Eighth Circuit Court database for "47B and 'summary judgment' " found 628 results, demonstrating that it is not remarkable for the Eighth Circuit to dispose of appeals from summary judgments pursuant to Rule 47B. The argument that a court of appeals errs merely because it affirms a judgment for the reasons mentioned in the opinion of the court below, without more, is untenable.

Horn also suggests that the summary judgment order in this case came in disregard of the requirements imposed by Federal Rule of Civil Procedure 56, and cases construing the burdens thereunder. FED. R. CIV. P. 56; *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 365 (8th Cir. 1987), *cert. denied*, 488 U.S. 1104 (1989). She suggests that the lower courts did not decide many facts, and indulge reasonable inferences, in her favor. But the opinions below belie that contention. Consistent with *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), the lower courts adhered to their obligation to draw inferences favorable to Horn. The lower courts did so with respect to her allegations of Title VII racial discrimination ("Horn's allegations of harassment fall far short of the level of harassment required to state a Title VII violation, even assuming that all of the conclusory allegations Horn offers are true."); racially discriminatory discharge ("Even if this Court were to assume that Horn satisfactorily performed her job and therefore could

establish a *prima facie* case of racially discriminatory discharge, Bassett has articulated a legitimate nondiscriminatory reason for Horn's discharge."); her ADA claims (" . . . [A]ssuming the facts that Horn alleges are true Bassett did not terminate Horn based on a belief or unfounded assumption regarding Horn's having to miss work to care for disabled family members."); and her FMLA claim ("Assuming for the purpose of analysis that Horn can establish a *prima facie* case of retaliatory discharge under the FMLA, this Court determines that Bassett has proffered a legitimate, nondiscriminatory reason for terminating Horn."). These examples demonstrate that in granting and affirming the summary judgment, the lower courts consistently assumed that all facts alleged were true, but still concluded that Bassett was entitled to judgment as a matter of law. Horn's Petition does not show that the lower courts substantially departed from accepted practice in this regard because, regardless whether factual disputes are resolved in her favor, Bassett was still entitled to judgment as a matter of law.

Horn suggests that summary judgment standards must be applied with "added rigor" in employment discrimination cases, but makes no showing that the courts below departed from a higher standard. For example, any factual disputes about Horn's overtime attendance are rendered immaterial by the existence of a legitimate, nondiscriminatory basis for her termination – as the lower courts noted, even if Horn could establish *prima facie* cases on her various claims, she still could not prevail because Bassett offered a legitimate, nondiscriminatory basis for her termination. To avoid summary

judgment Horn was obligated to raise a fact issue whether the basis was pretextual. Her failure to do so does not render the summary judgment deficient, and certainly does not make the present case more worthy of review by this Court.

While employment discrimination cases may involve special burdens, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), that fact does not demonstrate that summary judgment in this case was erroneous. The opinions of both the lower courts demonstrate adherence to the particular employment discrimination standards, and in no way demonstrate a substantial departure that must be corrected on writ of certiorari.

C. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HORN HAS NOT ESTABLISHED THE EXISTENCE OF ANY CONFLICTS CREATED BY THE OPINIONS BELOW.

In her petition Horn alleges the existence of a conflict relative only to two points, namely, the issues relating to the scope of the EEOC charge and the hostile work environment claim. The questions presented to this Court do not demonstrate the existence of any such conflict between the opinions below and any other precedent from this Court or another court of appeals.

Scope of the EEOC charge Contrary to Horn's assertion, there is no conflict between the opinions of the lower courts and *EEOC v. Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992). The lower courts expressly followed the test used in *Delight* wherein the court held that an EEOC lawsuit "may extend to any discrimination like or

related to the substance of the allegation in the charge and which reasonably can be expected to grow out of it." *Delight*, 973 F.2d at 668.

The "like or related to" rule helps foster the policy underlying Title VII of achieving voluntary compliance through conciliation, so it is not surprising that the Eighth Circuit has held that "[a]llowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994) (quoting *Babrocky v. Jewell Food Co. & Retail Meat Cutters*, 773 F.2d 857, 863 (7th Cir. 1985); *see also Park v. Howard University*, 71 F.3d 904, 907-08 (D.C. Cir. 1995), *cert. denied*, 117 S. Ct. 57 (1996) (noting that even under the "like or related" test, a charge must allege conduct with sufficient specificity to allow for its investigation).

The *Delight* court explained that because the EEOC's investigation of a charge alleging discriminatory demotion uncovered evidence of constructive discharge and wage discrimination, the latter claims were like or related to the claim raised in the charge. But, as many cases have held, claims of discrimination in the terms and conditions of employment are conceptually distinct from claims of discrimination in the termination of employment. *See, e.g., Combs v. C.A.R.E., Inc.*, 617 F. Supp. 1011, 1012 (E.D. Ark. 1985); *Pickney v. American Dist. Tel. Co. of Ark.*, 568 F. Supp. 687, 691-92 (E.D. Ark. 1983). Horn admitted in this case that her EEOC charge only complains about her separation of employment. Therefore, the lower courts

did not act inconsistently with *Delight* in holding that the Title VII claim for racial discriminatory hostile work environment was not like or related to the claim in her charge. No conflict exists on the scope of the charge issue.

Hostile work environment The lower courts' disposition of Horn's hostile work environment claims brought either under Title VII or Section 1981 does not conflict with this Court's opinion in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and in fact, is compelled by the test announced therein. While Horn suggests that *Harris* "does not require hostility to any particular degree for a claim to be actionable," Pet. at 17, clearly that is not the case. This Court noted in *Harris*: "Conduct that is not severe or pervasive enough to create objectively hostile or abusive work environment – an environment that a reasonable person would find hostile – is beyond Title VII's purview." 510 U.S. at 21.

The lower courts properly held that Horn could not establish a *prima facie* case for hostile environment racial harassment because, taking her allegations as fact, the record did not demonstrate facts that were "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive work environment." The lower courts thus applied the precise test announced by this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), and repeated in *Harris*, 510 U.S. at 21.

In summary, Horn has failed to establish that the decisions of the lower courts conflict with any previous decisions of the Supreme Court or other Courts of Appeals. First, the opinions of lower courts do not conflict with either *Delight* or *Harris*, but instead, merely

apply the same tests used therein to the particular facts of the present case. Second, a petition for writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule, as is the allegation made by Horn herein. Third, judgment as a matter of law was proper for Bassett because regardless of the factual complaints alleged by Horn, the lower courts held that Bassett had a legitimate, nondiscriminatory basis for her termination which Horn failed to refute.

D. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HORN HAS NOT ESTABLISHED THE EXISTENCE OF ANY IMPORTANT FEDERAL QUESTION.

FMLA claim In regard to her FMLA claim, Horn states that this Court should grant certiorari because of the existence of an important federal question. However, Horn fails to state what important federal question is raised. And that is because no such federal question is present. At its essence, Horn's complaint under the FMLA is that the lower courts committed error in "overlooking" that she was not granted FMLA leave at a time when she was eligible to receive it, and that the discipline report interfered with her rights under the FMLA. Neither of these constitute important federal questions.

Supreme Court Rule 10 states that "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. While at most the error complained of by Horn constitutes an allegation of error in fact-finding, her allegations are not

supported by the record, and in fact no such errors exist. First, Horn alleges that Bassett admitted it never granted any family and medical leave during a time at which she was entitled to it. No such admission was ever made by Bassett and the record belies that alleged admission. Second, Horn stated that the disciplinary action interfered with her rights under the FMLA. But based on the record, the lower courts simply did not need to consider whether any such interference occurred. The lower courts held that even if on the record Horn could establish a *prima facie* case of retaliatory discharge contrary to the FMLA, Bassett was still entitled to judgment because it had proffered a legitimate, nondiscriminatory reason for terminating Horn, and Horn failed to offer sufficient evidence from which a rational finder of fact could conclude that Bassett's proffered reason was not the real reason and that instead the real reason was motivated by intentional discrimination.[5] Based on the record, this Court should not exercise its discretion to grant a writ of certiorari to review Horn's FMLA allegations.

ADA claim Horn apparently suggests the lower courts erred in relying on *Tyndall v. National Education Centers*, 31 F.3d 209 (4th Cir. 1994) to hold that there is no violation of the ADA if a non-disabled employee is disciplined for absences taken to care for a disabled family member, because such holding is contrary to congressional intent. *See* 42 U.S.C. § 12112(b)(4) (1994). Tyndall involved claims made by a terminated employee who was

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[5] It should be noted that her refusal to sign the report was not because of its discussion of any absences protected under the FMLA.

not disabled, but who missed work to take care of a disabled relative. The Fourth Circuit Court of Appeals held that Section 12112(b)(4) did not protect an employee who was not disabled but who missed work to care for a disabled family member. 31 F.3d at 214. Apparently, Horn now asserts that the propriety of the *Tyndall* holding is an important question of unsettled federal law.

The issue from *Tyndall* is neither unsettled nor controversial. The Tenth Circuit reached the same conclusion in *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1082-83 (10th Cir. 1997), holding that the ADA does not apply to require an employer to restructure an employee's schedule so as to accommodate or enable the employee to take care of another person with a disability. The court compared the facts in *Tyndall* with the legislative history of Section 12112(b)(4) and explained that the fact situation in *Tyndell* "involved situations squarely anticipated by the 101st Congress." *Id.* at 1083. The court then detailed the various indicia of legislative intent found in committee reports and floor debates, and concluded that the ADA was not designed to protect a non-disabled employee who misses work to assist a disabled individual. *See id.* at 1082-83; *see also Ennis v. National Ass'n of Bus. & Educational Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995) (construing Section 12112(b)(4) as inapplicable to protect a non-disabled employee).

The congressional intent behind Section 12112(b)(4) is thus routinely and consistently followed by federal courts, leaving no important federal question of law to be resolved by this Court. And while Horn complains that the interpretation of Section 12112(b)(4) required by its legislative history means the FMLA proscribes conduct

not proscribed by the ADA, that fact should not be surprising – both acts would not be needed if they proscribed identical conduct. Certiorari is not needed to reconcile two statutes enacted to protect different interests that are not in conflict.

Basis for discharging Horn Horn's final argument is that both lower courts erred in finding that Bassett had a legitimate, nondiscriminatory reason for discharging her. She argues that the courts erred in holding that her termination was based on a legitimate, nondiscriminatory reason, because, according to Horn, the reasons for the discipline report that led to her termination were illegitimate. There is no basis for this argument, and, again, Horn fails to state a sufficient reason for this Court to grant her petition.

As noted earlier, Horn presented no facts below to raise an inference that her discipline was racially-based or in contravention of rights protected by the ADA or the FMLA. Bassett terminated Horn's employment for a legitimate, nondiscriminatory reason – because she refused to sign a Discipline Report. She was terminated pursuant to a uniformly-applied policy by the same person who, fourteen months earlier, hired her. Ultimately, Horn fails to identify any cases with which the lowers courts conflict on this point, or any important question of federal law, or any other special or unusual circumstances that are deserving of this Court's review. The record indicates Bassett had the right to discipline her, and when she refused to sign the report, to consider her terminated.

In summary, Horn has not established the existence of an important federal question that must be resolved by

this Court. No such question exists as to Horn's claims under the FMLA; instead, those claims amount to no more than complaints about how perceived factual disputes were resolved by the courts below, complaints that were in fact rendered moot by the finding of a legitimate, nondiscriminatory reason for her termination. Similarly, no important federal question exists concerning the congressional intent behind Section 12112(b)(4) of the ADA, as that intent has been demonstrated by legislative history detailed in various other opinions. Finally, no important federal question arises from the discussion below of Bassett's basis for disciplining Horn, because, as the facts in the record demonstrate, Horn was disciplined for a legitimate, nondiscriminatory reason which Horn failed to refute by offering sufficient admissible evidence that Bassett's proffered nondiscriminatory reason was pretextual and instead motivated by intentional discrimination.

CONCLUSION

Horn has failed to show grounds for certiorari to be granted on this matter. For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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